Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

No. 78-266

SYUFY ENTERPRISES, a partnership, successor in interest to original plaintiffs, LAS VEGAS DRIVE-IN THEATRE, INC., SMOKE RANCH DRIVE-IN THEATRE, INC., LAS VEGAS THEATRE CORPORATION, and CONFECTION CORPORATION OF LAS VEGAS, INC.,
Petitioner,

vs.

NATIONAL GENERAL THEATRES, INC., ABC INTERMOUNTAIN THEATRE CO., NEVADA THEATRE CORPORATION, SOUTHWEST AMUSEMENT CORPORATION, LUCILLE MARLEAU CRAGIN, d/b/a EL PORTAL THEATRE, and LAS VEGAS CINERAMA THEATRE CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

ALIOTO & ALIOTO,
JOSEPH L. ALIOTO,
JOSEPH M. ALIOTO,
LAWRENCE G. PAPALE,
One Eleven Sutter Street,
San Francisco, California 94104,
Telephone: (415) 934-2100,
Attorneys for Petitioner.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

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Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on April 7, 1978, which affirmed a directed verdict by the United States District Court for the District of Nevada.

OPINIONS BELOW

The opinion of the Court of Appeals review of which is sought is reported at 575 F.2d 233 (9th Cir. 1978) and is attached as Appendix A to this petition.

The trial before a jury commenced on April 1, 1975 in the United States District Court for the District of Nevada. After four weeks of trial, and at the close of the plaintiff's case in chief, the defendants moved for a directed verdict. The trial Court took the motion under submission, and, two months later, on June 27, 1975, issued its minute order granting the motion for a directed verdict. Judgment was entered in favor of defendants on August 19, 1975. Plaintiff appealed, but this appeal was dismissed as untimely due to the existence of defendants' pending counterclaim which had not been tried pending the entry of the directed verdict on the complaint. On April 22, 1976 judgment was finally entered on the directed verdict from which plaintiff now appeals. The District Court's judgment was entered without an opinion and is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 7, 1978. A timely petition for rehearing was filed April 21, 1978 and denied on May 18, 1978. (Appendix B to this petition). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with nations, is declared to be illegal . . ."

QUESTIONS PRESENTED FOR REVIEW

1. Whether evidence of defendants' agreement not to deal with plaintiff, evidence of defendants' meetings at which defendants discussed plaintiff's entry into the market, evidence of defendants' purposeful parallel conduct in refusing to deal with plaintiff and evidence that defendants' group refusal to deal was not motivated by better business judgment was sufficient evidence from which a jury could have found that defendants conspired to boycott plaintiff in violation of Section 1 of the Sherman Act.

2. Whether the Court below violated the Seventh Amendment to the Constitution of the United States and contravened this Court's opinion in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944) by judging the credibility of witnesses upon an appeal from a directed verdict and by finding material facts directly contrary to the evidence.

3. Whether the Court below erred in directing a verdict in favor of defendants in light of this Court's opinion in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

STATEMENT OF THE CASE

A. THE NATURE OF THE CASE

This is a private antitrust suit brought by petitioner against respondents under Section 4 of the Clayton Act (15 U.S.C. § 15) to secure damages for violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

Petitioner Syufy Enterprises (hereinafter "Syufy") is engaged in the business of exhibiting feature length motion pictures in theatres throughout parts of California, Nevada and Arizona. In the Las Vegas metropolitan area, Syufy operates two drive-in theatres, the Las Vegas Drive-In No. 1 and the Las Vegas Drive-In No. 2.

The defendants in this action are National General Theatres, Inc. ("National General"), ABC Intermountain Theatre Company ("ABC"), Southwest Amusement Corporation ("SAC"), Las Vegas Cinerama Theatre Company ("Cinerama"), and Lucille Marleau Cragin ("Cragin"). Nevada Theatre Corporation ("NTC") was dismissed prior to the trial. During the relevant time period, all the defendants except SAC operated motion picture theatres in Las Vegas.

The principal charge in this case is that the named motion picture exhibitor defendants combined and agreed among themselves not to exhibit films on a first-run[1] day and date[2] basis with Syufy's drive-in

[1]A run is simply the continuous exhibition of a motion picture at a theatre. A first-run motion picture is a motion picture which is exhibited for the first time at a theatre in a particular market area. A subsequent-run motion picture is a picture which has already been exhibited in a particular market area at least one time.

[2]Motion pictures are exhibited on either an exclusive or a day and date basis. An exclusive exhibition of a motion picture means that only one theatre in a particular market area may exhibit the picture during a given run. A picture which is exhibited on a non-exclusive, or day and date, basis is one which may be exhibited simultaneously at several theatres in a particular market area.

theatres in Las Vegas and thereby have restrained trade in interstate commerce in violation of Section 1 of the Sherman Act. As a result of this combination to boycott Syufy, petitioner has suffered substantial losses.

B. MATERIAL FACTS

1. Background of the Las Vegas Market

Syufy entered the Las Vegas motion picture exhibition market in January of 1966. At that time Syufy commenced operation of its Las Vegas Drive-In No. 1. At that same time in Las Vegas there existed the El Portal theatre (owned by Cragin), the Guild, Huntridge and Fremont theatres (owned by NTC), the Fox Charleston theatre (owned by National General), and the Cinerama theatre (owned by Cinerama). Each of these theatres was a conventional "hard-top"[3] theatre.

Prior to 1966, from 1951 to 1965, defendants Cragin and NTC had participated in a split of motion picture

[3]"Hard-top is a term used in the motion picture exhibition industry which refers to the more conventional, enclosed theatre house. A hard-top theatre is to be distinguished from a drive-in theatre which exhibits motion pictures on an outdoor screen to patrons seated in automobiles.

product in Las Vegas.[4] Since Cragin and NTC were the only theatre operators in the Las Vegas market area playing first-run films at the time, they divided between themselves, pursuant to their agreement, the first-run films that the distributors offered for exhibition. (R. 215; T. 104-106, 114).[5] This split ended in 1965 when National General entered the market and began bidding for pictures. (R. 215-216; T. 206-207; 120). In 1967, however, these split meetings were revived. This time National General joined NTC and Cragin in the split agreement with the purpose of "eliminating bidding against one another." (T. 296, 125, 128). At that time, the only exhibitor actively bidding for first run product in Las Vegas was Syufy, who had entered the market in 1966 with his drive-in. (T. 140-141; 154; 162-163).

When Syufy entered the Las Vegas market in 1966, it requested the right to exhibit film at the Syufy drive-in theatres on a first-run, day and date basis with the defendants' hardtop theatres. (EX. 14-25). In 1968, the distributors, prodded by Syufy's requests, began to offer their films for exhibition in Las Vegas on an "either/or" basis, that is, they were willing to sell their film to exhibitors either on a

[4]A split of motion picture product is an agreement among motion picture exhibitors in a particular market area not to compete among each other for the purchase of motion pictures from distributors. By the terms of such a split agreement, each participant is assigned a particular motion picture on which he is to bid. That participant promises that he will attempt to purchase that film only and no other. In return, he is assured that no split partners will compete with him in the purchase of that film.

[5]"R" refers to the Record on Appeal; "T" refers to the Reporter's Transcript; and "EX" refers to Trial Exhibits.

first-run exclusive or a first-run, day and date basis. (T. 266-271; 465). Any day and date run was to include a conventional and a drive-in theatre. (T. 267-268). Effectively, the distributors were giving the conventional motion picture theatre exhibitors the opportunity to play first-run, day and date with a drive-in if they chose to do so. (T. 271). In this manner, although a drive-in theatre might submit a bid to play a particular motion picture day and date, this bid could not be accepted by the distributor unless a hard-top theatre offered a day and date bid as well. (T. 272; 274-75).

But although Syufy requested it (T. 880) and although day and date exhibition of first-run motion pictures was a common method of film distribution in other areas (T. 230-232), during the period 1968-71 no hard-top ever played day and date with a Syufy drive-in on any first-run motion picture (T. 1271; 233-34; 248; 275).

2. Evidence of Defendants' Agreement Not to Deal with Syufy

Raymond Syufy, general partner of petitioner Syufy Enterprises, testified at trial about his competitors' concerted response to his entry into the Las Vegas motion picture market in 1966. Not only did each defendant refuse to play first-run, day and date with the Syufy Las Vegas Drive-In, but they warned that it was no use to even request day and date exhibition because defendants had agreed among themselves not to play day and date with a drive-in. This admission was made to Mr. Syufy, in varying forms, by Lloyd

Katz, a representative of defendant NTC (T. 945-46; 952:53; 950); by Horst Schmidt, general manager of defendant Cragin (T. 955-58); and by Dan Polier and Ralph Adams, chief film buyers for defendant National General (T. 959-60; 963).[6]

Also, an independent witness, Emmett Shane, former film buyer for defendant National General, testified that his superior at National General, Ralph Adams, had told him not to worry about the theatres in Las Vegas because "they had an agreement, an understanding, . . . that no one would go day and date with the drive-in in Las Vegas." (T. 780).

In addition to this direct evidence, other evidence of defendants' meetings was presented which shows that defendants had the opportunity to agree to refuse to deal with Syufy. During the years 1951-1965 defendants Cragin and NTC attended split meetings at which these two competitors would divide the motion pictures released for first run exhibition in Las Vegas. By this arrangement Cragin and NTC would not have to bid against each other for films. In 1967 through 1969, National General joined NTC and

[6]As an example of the defendants' admissions, Syufy testified to the following conversation with Lloyd Katz:

"A. He asked me why I had come in. I told him that I came in to operate a first-run drive-in on a day and date basis, that I was going to play with the indoor theatres like I had been doing in San Francisco.

"Well, he told me there was not a chance, that I was going to go broke in Las Vegas, that he and the other theatre, the El Portal, had an agreement that they would not play with a drive-in theatre. And that was about the end of it, that conversation."

(T. 945).

Cragin in the split agreement. And again in 1971 the split meetings were resumed.

Lloyd Katz of defendant NTC admitted that upon occasion the participants of the split would meet and discuss Syufy and the ramifications of Syufy's requested first-run, day and date exhibition. Katz revealed that discussion of Syufy's desire to play day and date was an "alert" to the participants of the split. Each split member was made aware that he must "protect and preserve" the product that had been split to him. (T. 296-299). Katz further admitted that an "independent" refusal to deal with Syufy on a first-run, day and date basis was necessary if defendants were to maintain the integrity of their split arrangements. (T. 299).

Horst Schmidt, head film buyer for defendant Cragin, revealed that he was aware of a "policy" among the exhibitors not to play first-run, day and date. This "policy" to which the exhibitors agreed was communicated by what Schmidt called "shop talk" at the split meeting. (T. 288). Each participant in the split ring knew the other was adhering to this same "policy". (T. 890).

Further evidence which raises the inference that these defendants combined to preclude Syufy from the first-run, day and date market in Las Vegas is the fact that not once during the four year damage period did any one of the defendants so much as offer to play day and date with Syufy, even though first-run films were being offered by distributors on a day and date basis in Las Vegas (T. 266-67; 2148); even though it

would have been more profitable for the defendants to have exhibited their film on a day and date basis;[7] (T. 1301; 1423; 2162; and even though day and date exhibition was more the rule that the exception in other motion picture exhibition markets in the West (T. 230-32; 1053). This parallel course of conduct, adamantly maintained against defendants' own economic interest even in the face of market conditions which would ordinarily dictate a day and date run, raises a question of fact as to whether an actual agreement existed among competitors to boycott Syufy.

REASONS FOR GRANTING THE WRIT

A. CONFLICT WITH THE DECISIONS OF THIS COURT

The rulings below undermine decisions by this Court regarding the role of the jury and the amount of evidence necessary in proving the existence of a conspiracy in an antitrust case. Furthermore, by purposefully ignoring the function of the jury, the courts below have effectively emasculated this Court's express policy of vigorous enforcement of the federal antitrust laws through private civil damage suits.

This Court has consistently recognized the difficulty faced by antitrust plaintiffs in attempting to prove the existence of a conspiracy. Numerous cases decided by this Court have mandated lower courts to be more

[7]For example, defendant Cragin, which had been losing money, experienced an increase in revenues and a leveling off of losses when it began to play day and date with Syufy in Las Vegas in 1974. (T. 302).

liberal in allowing plaintiffs to utilize circumstantial evidence. Moreover, this Court has condemned the use of summary procedures to invade the province of the jury in antitrust cases. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939); *Poller v. Columbia Broadcasting System,* 368 U.S. 464 (1962); *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1972).

In this case, as in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.* and *Continental Ore Co. v. Union Carbide & Carbon Corp.,* the existence and purpose of defendants' conspiratorial conduct were ". . . material issues of fact which could only be resolved by the jury after a plenary trial." *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700, 703-704 (1969).

As described in the Statement of the Case, there was clear and direct evidence (1) that the defendants all refused to bid for films on a day and date basis notwithstanding the fact that the distributors made day and date exhibitions available to them, (2) that the defendants met and discussed Syufy and the potential effect of his entry into their market, (3) that certain defendants admitted that there was an agreement among defendants not to play day and date with Syufy, (4) that certain defendants admitted that Syufy's entry into this market and the prospect of any bidding on a day and date basis would destroy defendants' lucrative split agreements maintained at the expense of the distributors, and (5) that, notwith-

standing defendants' position, day and date bidding was a common method of film exhibition in markets other than Las Vegas. This evidence, given the decisions in *Theatre Enterprises* and *Continental Ore,* should be recognized as more than enough to create a question of fact for the jury as to whether defendants' conduct was the result of independent decision, or conspiracy, tacit or express.

B. THE COURT OF APPEALS HAS FOUND FACTS OPPOSITE TO THE EVIDENCE IN THE RECORD

In the opinion below, while reviewing the evidence, the Court of Appeals mistakenly held that "appellant (Syufy) offered *no* evidence that films were available on a day/date basis." (Appendix A, page viii; emphasis added). It therefore reasoned that defendants could not have conspired to refuse to bid on day and date exhibitions since that manner of exhibition was not available to them. Both this finding and the conclusion drawn from it are plainly wrong and clearly contrary to the evidence.

Day and date exhibition *was* available to defendants. Mr. Lloyd Katz, general manager of NTC, a defendant that settled before trial, testified that the distributors offered exhibitors the choice of bidding for film on either an exclusive *or* day and date basis.

> "Q. But as I understand it, around 1968, distributors started to offer a class of pictures on an either/or basis, which means either one theatre plays it exclusively or we will accept a situation in which two theatres, the hardtop and a drive-in play it simultaneously?
>
> "A. *That's correct.*" (T. 271).
>
> * * *
>
> "A. *The distributor is saying people in the area, if they want to play day and date, we're going to give them the opportunity to do so.*" (T. 271).
>
> * * *
>
> "Q. All right. *Now, there came a time, did there not, when the distributors started offering pictures differently than they had before in Las Vegas, true?*
>
> "A. Yes.
>
> "Q. (By Mr. Salomon) Would you explain the difference in the offers?
>
> "A. *More films were offered either way, either exclusive or day and date.*
>
> "The Court: When was this, sir?
>
> "The Witness: *This would have been some time prior to 1968.*
>
> "Q. (By Mr. Salomon) And some time subsequent to 1966?
>
> "A. Yes.
>
> "Q. Now, please explain this new kind of bid solicitation on the part of the distributors to the jury, this either/or situation?
>
> "A. *The distributor on certain films which he felt were compatible to this type of distribution,* and I will explain that, if I may, with counsel's approval?——
>
> "Q. Yes.
>
> "A. ——*offered his films on a bidding basis to the competing exhibitors on either of those bases,* either on an exclusive run basis, meaning that

whatever theatre was awarded the film would play it in this geographical area exclusively, have it all to himself, and the alternate was, on what we call a day and date basis, and, as I recall, the bid solicitation specified not to exceed one conventional and drive-in as opposed to two conventionals. *So what we were saying is, the exhibitor had the option of bidding on the film on either an exclusive basis or day and date to play with a drive-in.*" (T. 266-268).

The Court of Appeals chose to ignore this evidence and formally found the opposite.

The Court below also chose to ignore evidence of agreement and conspiracy among defendants, finding instead that there was "*no* evidence to show that appellees (defendants) had conspired to refuse to bid day/date to the detriment of appellant." (Appendix A, p. v; emphasis added). Again the Court is plainly wrong as the direct testimony of Messrs. Syufy and Shane (along with the other evidence set forth above in the Statement of the Case) clearly demonstrates.

From 1966 through 1969 Emmett Shane was the head booker for defendant National General. As booker, Shane would bid for motion pictures on behalf of National General in the Las Vegas area. (T. 765). He also attended the split meetings held in 1968 and 1969. (T. 782). Shane's immediate superior was Ralph Adams, head film buyer for National General Corporation. (T. 764). With respect to Las Vegas and the attempts made by Syufy to play day and

date, Shane testified to the following conversations had with Adams:

"Q. (By Mr. Salomon) Did you express any concern to Mr. Adams concerning Mr. Syufy's attempts to play on a day and date basis?

"A. His statement to me was no one was going to play day and date with Syufy in Las Vegas, that a decision had been made not to play day and date with the drive-in." (T. 771).

* * *

"A. Mr. Adams told me not to worry about the three 20th Century Fox motion pictures, that Fox wanted to go day and date on them in Las Vegas—not to worry about it because no one was going to play day and date on these three pictures.

"Q. (By Mr. Salomon) Did you say anything in response to that to Mr. Adams?

"A. I was concerned because this was a period in the split where we were experiencing some difficulty, and I was concerned that maybe there's always—maybe a split is going to blow up and someone would go day and date on one or two or three of these pictures.

"But he assured me that they had an agreement, an understanding, which was the substance of what he said, that no one would go day and date with the drive-in in Las Vegas." (T. 780).

Raymond Syufy, general partner of Syufy Enterprises, also testified that he had had conversations with various of the defendants at which defendants' agreement not to play day and date was mentioned. Syufy testified to one such conversation with Lloyd Katz in 1968 as follows:

"A. Well, we asked Katz again to play day and date with us, play his indoor theatre with our drive-in, explained to him that there were two separate markets. And I felt that the people should have a choice to decide where they wanted to go, whether the drive-in or the indoor. And he said they had an agreement with the indoor operators not to play with the drive-in theatre. And that I'd never get day and date in Las Vegas. In fact, the conversation came up where he wanted to buy my drive-ins out or try and work a deal out, and I wasn't interested." (T. 950).

In other conversations with Katz, Katz advised Syufy that Syufy would go broke in Las Vegas because there was an agreement between the exhibitors there not to exhibit film on a first-run, day and date basis with Syufy's drive-in in Las Vegas. (T. 945; 950; 952-53).

Between 1966 and 1970 Syufy initiated three conversations with Horst Schmidt, the general manager of defendant Cragin, in which Syufy sought first-run, day and date exhibition in Las Vegas, and Schmidt advised that he had an agreement with the other exhibitors not to play day and date with a drive-in. (T. 955-958).

Syufy also contacted defendant National General seeking day and date exhibition in Las Vegas. In one conversation in 1966 with Dan Polier, chief film buyer for National General in Las Vegas at the time, Polier told Syufy that he had agreed with other theatre exhibitors in Las Vegas not to play day and date with

a drive-in. (T. 959-960). In subsequent conversations with Ralph Adams, successor to Polier at National General, Adams also told Syufy that National General had agreed with the other Las Vegas exhibitors not to play on a day and date basis. (T. 960; 963).

Given this testimony, it is evident that there *was* in fact evidence from which the jury could have believed that defendants conspired to deprive plaintiff of day and date exhibition. The Court of Appeals may not weigh the credibility of the evidence and thereafter refuse to allow that evidence to be submitted to the jury. To hold the contrary would be to contravene this Court's decision in *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29 (1944). It is simply a denial of this petitioner's constitutional right under the Seventh Amendment for this or any other Court to decide questions of fact and the credibility of witnesses. Petitioner respectfully submits that, under the proper standard of review of a directed verdict, giving the petitioner the full benefit of its evidence and the fair inferences, this Court should and must correct the judgment of the Court of Appeals in this case and permit the petitioner to have its cause properly decided by a jury as is its right.

C. THE COURT OF APPEALS HAS DIRECTLY CONTRAVENED THIS COURT'S OPINION IN THEATRE ENTERPRISES, INC. v. PARAMOUNT FILM DISTRIBUTING CORP.

The opinion of the Court of Appeals is in direct contravention of this Court's opinion in *Theatre En-*

terprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

In the present case, the Court of Appeals acknowledged the evidence of defendants' parallel business conduct by admitting that "it is true that the film exhibitors all refused to bid for films on a day/date basis." (Opinion, p. 6, lines 1-2). The Court nevertheless refused to submit the question of defendants' conspiracy to the jury based upon this evidence of parallel conduct.

In *Theatre Enterprises* this Court held that evidence of parallel business behavior, without more and even in the face of defendants' explanations, while not sufficient to compel the conclusion of conspiracy, *at the very least* created a *question of fact* concerning the existence of a possible conspiracy which should be put to the jury for determination.

The Court of Appeals failed to follow the clearly enunciated principles of *Theatre Enterprises* and this Court should correct this error by allowing petitioner its trial by jury.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

Dated, San Francisco, California,
August 15, 1978.

Respectfully submitted,
ALIOTO & ALIOTO,
JOSEPH L. ALIOTO,
JOSEPH M. ALIOTO,
LAWRENCE G. PAPALE,
Attorneys for Petitioner.

(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
Ninth Circuit

No. 76-2003

Syufy Enterprises, a partnership, successor in interest to original plaintiffs, Las Vegas Drive-In Theatre, Inc., Smoke Ranch Drive-In Theatre, Inc., Las Vegas Theatre Corporation, and Confection Corporation of Las Vegas, Inc.,

Appellant,

vs.

National General Theatres, Inc., ABC Intermountain Theatre Co., Nevada Theatre Corporation, Southwest Amusement Corporation, Lucille Marleau Cragin, d/b/a El Portal Theatre, and Las Vegas Cinerama Theatre Co.,

Appellees.

[Filed Apr. 7, 1973]

Appeal from the United States District Court
District of Nevada

OPINION

Before: KILKENNY and GOODMAN, Circuit Judges, and MURRAY, District Judge.*

*The Honorable William D. Murray, Senior United States District Judge for the District of Montana, sitting by designation.

KILKENNY, Circuit Judge:

Appellant appeals from a directed verdict granted on its antitrust claim against appellees. The district court concluded that the evidence of violation of § 1 of the Sherman Act, 15 U.S.C. § 1, was insufficient. We affirm.

FACTS

This action was filed in federal district court in 1971 alleging violations of §§ 1 and 2[1] of the Sherman Act. In essence, the complaint charged certain Las Vegas theatre owners of conspiring with non-named film distributors to confine the exhibition of first run films to appellees' theatres. In addition, appellees were charged with secretly agreeing to divide first run films among themselves to the exclusion of the appellant. Appellees answered and also counterclaimed alleging that the appellant had engaged in abuse of the litigation process. The trial before a jury commenced in 1975, and at the conclusion of the appellant's case the court granted appellees' motion for a directed verdict. Appellant filed a notice of appeal which was dismissed without prejudice in light of the pending counterclaim. The counterclaim went to trial in 1976, and appellant's motion for mistrial was granted. The counterclaim was then severed from the original complaint allowing for this appeal.

THE LAS VEGAS THEATRE MARKET

Appellant entered the theatre business in Las Vegas in 1966 when it opened the Las Vegas Drive In. Four

[1]The § 2 claim was not pursued.

of the named appellees were operating theatres at that time, the Nevada Theatre Corporation [NTC], National General Theatres [National General], Las Vegas Cinerama [Cinerama], and Cragin. (Hereinafter collectively referred to as exhibitors.) All of these appellees were operating conventional indoor theatres when the appellant opened its drive-in theatre. There were two other drive-ins in Las Vegas in 1966, one operated by National General and the other by a non-party. Another named appellee, ABC Intermountain Theatre Co. [ABC], opened its first Las Vegas theatre in 1970.[2] The record does show that during the 1966-1971 period there was at least one other theatre, The Bonanza, operating in the Las Vegas market.

During the five years preceding this action Las Vegas theatre owners drifted in and out of so called "split agreements." As defined by the district court a split is an arrangement among participating exhibitors in a market area entered into with the knowledge and consent of distributors. The participants therein agree that a member thereof shall have the first right to negotiate with a licensing distributor. A split can be by company or by picture. In a company split, the participating exhibitors agree that a member thereof shall have the right to negotiate for the pictures released by a given company prior to any other members doing so. In a picture split, the participants agree that a member thereof shall have the right to negotiate for a particular picture prior to the other

[2]Appellant introduced no proof as to Southwest Amusement Corporation.

members so doing. From 1951 to 1965 there were only two exhibitors in Las Vegas, and they were parties to a split agreement. During 1966 and 1967 there was no split agreement, and all theatre owners competed freely for films. In 1968 another split agreement was born among National General, Cragin, and NTC. The split dissolved, and for all of 1969 and 1970 the Las Vegas exhibitors again bid without restraint for their films. In 1971 all of the named appellees, as well as the appellant, formed yet another split agreement. Appellant withdrew later that year and filed this claim. At no time was the Bonanza Theatre a party to any split agreement. Appellant does not challenge nor would such a challenge be sustained to the various split agreements. *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 20 (CA9 1971).

In addition to the split agreements, the process of procuring a motion picture for showing in a particular theatre is complicated by the terms of the distributor's contract with the individual exhibitor. Generally, distributors ask for bids on all their films. They can seek bids on at least three sets of terms. First, the distributor can extend bid invitations to an exhibitor on an "exclusive" basis. As the district court found, a picture exhibited on an exclusive basis is shown at only one theatre in any one particular market area. Second, the distributor can offer to bid the film on a "day/date" basis. This would mean that the film would be shown at more than one theatre, either drive-in or conventional, in a given market area at any one time. Third, the distributor could offer the

film to bidders under either plan and then decide which one to accept. This is commonly referred to as "either/or" bidding. The decision on how to offer films for bids and what bids to accept rests solely with the distributor.

The business reasons for the differing types of exhibition contracts are obvious. The day and date allows the theatre owner to submit lower bids for films since they will not have the exclusive showing rights. This is balanced by the fact that the theatres using day and date will be competing for the same customers. The exclusive showing rights afford just the opposite considerations. Exhibitors pay higher film rental rates, but are guaranteed exclusivity. In addition, the distributors will have a greater opportunity to profit from second showings in other theatres if the first run was on an exclusive basis.

The appellant contends that the named appellees agreed not to bid for films on a day/date basis. Consequently, appellant charges that it was forced to bid for all films on an exclusive basis. Appellant claims that it was new to the Las Vegas theatre market, and consequently was unable to offer the sort of past attendance figures to allow it to bid successfully for most exclusive pictures. The district court found that there was no evidence to show that the appellees had conspired to refuse to bid day/date to the detriment of the appellant. We agree.

STANDARD OF REVIEW

Since this matter is before the court from the entry of a directed verdict, our standard of review is quite strict. Our recent opinion in *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (CA9 1976), *cert. denied* 429 U.S. 940, accurately describes our task:

> "Our inquiry, therefore, is not whether there is substantial evidence supporting a finding of independent business purpose, but whether no reasonable jury could have found that Distributor participated in a conspiracy to restrain trade. The burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact, and, in determining whether the burden has been met, we must draw all inferences of fact against the movant and in favor of the party opposing the motion." at 683.

Although this language speaks with respect to a motion for summary judgment, the *Calnetics* court properly expanded it to review of directed verdicts. *See also, Santa Clara Valley Distributing Co. v. Pabst Brewing Co.*, 556 F.2d 942, 944 (CA9 1977).

EXHIBITORS' INVOLVEMENT

Appellant offered two witnesses to prove there was an agreement among Las Vegas theatre owners not to bid day/date for films to be shown in their market. The first witness was one Shane, former head booking agent at National General. His testimony is somewhat ambiguous, but a fair reading does not show the existence of any agreement among the appellees to

refuse to bid day/date with appellant. The other witness offered to prove the conspiracy was the appellant himself. He suggested that several employees of the appellees had told him that they could not bid on a day/date basis for films because of an agreement between the various appellees. The distributors were not mentioned. Again the record is devoid of any substantial proof of an actionable conspiracy. Rather, the testimony of officials of the various exhibitors demonstrates that each theatre had a formal individual policy of bidding for films on an exclusive basis only.

While it is true that the film exhibitors all refused to bid for films on a day/date basis, this mere parallel conduct, in and of itself, does not equate with proof of a conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Dahl, Inc. v. Roy Cooper Co., supra; C-O Two Fire Equipment Co. v. United States*, 197 F.2d 489 (CA9 1952), *cert. denied* 344 U.S. 892. The testimony indicated that there were various independent business reasons for choosing to bid for films on an exclusive only basis. Proof of mere parallel action on this record is insufficient. Furthermore, the testimony shows that the Bonanza theatre, not charged to have been a member of the alleged illegal conspiracy, at all relevant times chose not to bid for films on a day/date basis despite appellant's resquests that it do so. We can only assume that the independent business motivation for offering films on an exclusive basis was behind Bonanza's decision.

DISTRIBUTORS' INVOLVEMENT

It is the distributors' absolute control over film exhibition that fully exposes the fatal flaw in appellant's arguments. As we have noted, the motion picture distributors decide how to offer films to the exhibitors and just what bids to accept, yet they are not defendants nor charged with the conspiracy. Since the exhibitor can only bid for films consistent with the distributors' bid invitation, the appellant must show that films were offered for bids on a day/date basis in the Las Vegas area before it could prove that the appellees had conspired not to bid for the films on a day/date basis. Here appellant offered no evidence that films were available on a day/date basis. In fact, on cross-examination appellant admitted that the large majority of films offered for bids during the 1967-1971 period were available on an exclusive basis only. Manifestly, the appellees could not conspire to refuse to bid on something that was not available to them. *A.L.B. Theatre Corp. v. Loew's Inc.*, 355 F.2d 495 (CA 7 1966).

Moreover, appellant has failed to show that there was anything but an individual decision on the part of each distributor to offer films on an exclusive basis only. While the record does indicate that a distributor's decision on the method of offering its films to exhibitors may be influenced by the exhibitors themselves, there is no evidence to suggest that the appellees in any way dictated distributor policy. A mere refusal by an individual distributor to offer films on a day/date basis without an agreement does not violate

the antitrust laws. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1220 (CA9 1977), and *Dahl, Inc. v. Roy Cooper Co., supra.*

DAMAGES

In the light of the above conclusions, we do not reach the issue of damages.

CONCLUSION

The judgment of the district court must be affirmed.

IT IS SO ORDERED.

Appendix B

United States Court of Appeals
Ninth Circuit

No. 76-2003

Syufy Enterprises, a partnership, successor in interest to original plaintiffs, Las Vegas Drive-In Theatre, Inc., Smoke Ranch Drive-In Theatre, Inc., Las Vegas Theatre Corporation, and Confection Corporation of Las Vegas, Inc.,

Appellant,

vs.

National General Theatres, Inc., ABC Intermountain Theatre Co., Nevada Theatre Corporation, Southwest Amusement Corporation, Lucille Marleau Cragin, d/b/a El Portal Theatre, and Las Vegas Cinerama Theatre Co.,

Appellees.

[Filed May 18, 1978]

Appeal from the United States District Court
District of Nevada

ORDER

Before: KILKENNY and GOODMAN, Circuit Judges, and MURRAY, District Judge.*

*The Honorable William D. Murray, Senior United States District Judge for the District of Montana, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Appendix C

United States District Court
District of Nevada
Civil No. LV 1724-RDF

Las Vegas Drive-In Theatre, Inc., et al.,
Plaintiffs,
vs.
National General Theatres, Inc., et al.,
Defendants.

[Filed Apr. 22, 1976]

JUDGMENT ON DIRECTED VERDICT

This action, having come on for trial before a jury, the Honorable Roger D. Foley, United States District Court for the District of Nevada, presiding, has been disposed as follows. This Court has ordered:

1. The defendants' motion for directed verdict on the complaint has been granted.

2. The plaintiffs' motion to reconsider, filed April 2, 1976, is denied.

3. The counterdefendants' motion made orally for a mistrial on the counterclaim is granted on the grounds stated upon the record.

4. The counterclaim is hereby severed from the complaint in this action.

5. The counterclaim is hereby stayed pending a decision from the Ninth Circuit Court of Appeals

on the appeal which is expected to be taken from this Court's order granting the defendants' motion for a directed verdict on the complaint.

6. The counterclaimants will have fifteen (15) days from the date the mandate from the Court of Appeals on the complaint is spread upon the record of this Court to file and serve an amended counterclaim. The counterdefendants will not be required to file an answer to the amended counterclaim until after a decision has been made on the motion for summary judgment which the counterdefendants are expected to file against the amended counterclaim.

7. The counterdefendants will have thirty (30) days from the date of filing of the amended counterclaim or forty-five (45) days from the date the mandate from the Court of Appeals on the complaint is spread upon the record of this Court to file and serve a motion for summary judgment against the existing counterclaim (if no amendment is filed) or against the amended counterclaim. The counterclaimants will respond to the motion for summary judgment as prescribed under the local rules of this Court.

8. Disposition:

a. If the Court of Appeals should reverse this Court's order granting the directed verdict on the complaint, the case will be retried on the complaint to a new jury.

b. If there is a reversal as in (a) above and, if this Court should deny the counterdefendants' motion for summary judgment against the counterclaim,

the counterclaim will be consolidated with the complaint and tried at the same time to a new jury.

c. If the Court of Appeals should affirm this Court's order granting the directed verdict on the complaint, and should this Court deny the counterdefendants' motion for summary judgment against the counterclaim, the counterclaim will be retried to a new jury.

There being no just reason for delay in entering this judgment in favor of the defendants on the complaint, it is hereby expressly directed, ordered, adjudged and decreed:

That judgment be entered in favor of defendants on the complaint, and that defendants shall be awarded costs.

Dated: April 19, 1976.

Approved As To Form:

/s/ Joseph M. Alioto
Joseph M. Alioto
Attorney for Plaintiffs

/s/ Allan Albala
Allan Albala, Member of Swerdlow, Glikbarg & Shimer, a Professional Corporation.
Attorney for Defendants

/s/ Roger D. Foley
Roger D. Foley
Judge, United States District Court
4/22/76

Appendix D

United States District Court
District of Nevada

No. LV 1724

Las Vegas Drive-In Theatre, Inc., et al.,
Plaintiffs,

vs.

National General Theatres, Inc., et al.,
Defendants.

[Filed Aug. 18, 1975]

REVISED FINDINGS OF FACT AND CONCLUSION OF LAW

In ruling upon Defendants' Motion for a Directed Verdict, the Court has viewed the evidence in the light most favorable to plaintiff, made all inferences which could reasonably be drawn therefrom by a jury of reasonable men, and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Parties and Claims Asserted

1. This action was brought by plaintiffs to recover treble damages and to seek injunctive relief for alleged violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) involving the distribution and exhibition of feature pictures in the Las Vegas metropolitan area of Clark County, Nevada.

2. The original plaintiffs were Las Vegas Drive-In Theatres, Inc., Smoke Ranch Drive-In Theatre, Inc., Las Vegas Theatrical Corporation and Confection Corporation of Las Vegas, Inc. Syufy Enterprises, a partnership, is successor to the four corporations named in the complaint and is the proper party plaintiff.

3. During the relevant time period plaintiff operated two drive-in theatres in the Las Vegas area called the Las Vegas Drive-In No. 1 and the Las Vegas Drive-In No. 2. The Las Vegas Drive-In No. 1 opened for business in January, 1966. The Las Vegas Drive-In No. 2 was built in 1971 on the same location as the Las Vegas Drive-In No. 1, resulting in the creation of a twin drive-in theatre. It opened for business in March, 1971. Incidental to the operation of the drive-in theatres, plaintiff sells snacks, beverages and refreshments to patrons of its theatres.

4. The original defendants in this action were National General Theatres, Inc. (National General), ABC Intermountain Theatre Company (ABC), Nevada Theatre Corporation (NTC), Southwest Amusement Corporation (SWC), Las Vegas Cinerama Theatre Company (Cinerama Theatre), and Lucille Marleau Cragin d/b/a El Portal Theatre (Cragin). Nevada Theatre Corporation was dismissed prior to the trial.

5. The following eleven major distributors of motion pictures in the United States were named in this action as nonparty coconspirators with defendants:

Columbia Pictures Company
Buena Vista Distribution Co., Inc.
Metro Goldwyn Mayer, Inc.
Paramount Pictures Corporation
Universal Film Exchanges, Inc.
Warner Bros. Seven Arts Distribution Corp.
Twentieth Century-Fox Films Corporation
National General Pictures
American International Pictures
United Artists Corporation
Embassy Pictures

6. The period of time for which damages were sought in this case was the four years preceding the filing of the complaint on November 24, 1971. (15 U.S.C. 15(b))

Definitions

7. The definitions applicable to these findings of fact are as follows:

(a) *Conventional or Drive-In*—The term conventional, hardtop and walk-in are synonyms for a theatre into which patrons walk and occupy a seat when viewing a motion picture. Drive-in theatres are theatres into which patrons drive their cars and view the motion picture from the car with the sound being transmitted through an individual speaker.

(b) *First-Run or Subsequent-Run*—A first-run motion picture is a motion picture which is exhibited for the first time at a theatre or theatres in a particular market area. A subsequent-run motion picture is a picture which is exhibited in another

theatre or theatres subsequent to the completion of its first exhibition in that market area. A run is a continuous exhibition of a motion picture at a theatre.

(c) *Exclusive or Day and Date*—Motion pictures are exhibited either on an exclusive or on a nonexclusive basis. If a picture is exhibited on an exclusive basis, only one theatre in a particular market area is exhibiting the picture. On a nonexclusive basis a picture is exhibited "day and date" (simultaneously) at one or more drive-in theatres or one or more walk-in theatres or any combination of either.

(d) *Bidding or Negotiation*—Motion pictures are licensed either by bidding or negotiation. When a distributor licenses a picture on a bid, it first sends out a bid invitation to the exhibitors in a particular area announcing the availability date of the motion picture being released and the deadline for submission of bids. The bid invitation also specifies, among other things, the manner in which the picture will be exhibited, exclusive or nonexclusive. The distributor accepts one or more bids or rejects all bids. If the distributor rejects all bids, he rebids the picture and goes through the same process again or he enters into negotiations with one or more interested exhibitors for the licensing of that motion picture. Negotiations need not follow bidding. A distributor may, rather than send out bid invitations, simply enter into negotiations with one or more exhibitors in a particular market area for the licensing of the motion picture.

(e) *Exclusive or Either/Or*—Just as pictures are exhibited on an exclusive or nonexclusive basis, distributors offer pictures for licensing in the same manner. Thus, a distributor offers to license pictures only on an exclusive basis; only on a day and date basis; or on an either/or basis, giving exhibitors a choice to make an offer to license the picture exclusive or on a day and date basis. The distributor decides which of the offers to accept.

(f) *Split of Product*—A split of product (motion pictures) basically is an arrangement among participating exhibitors in a market area entered into with the knowledge and consent of distributors. The participants therein agree that a member thereof shall have the first right to negotiate with a licensing distributor. If such exhibitor is not able to agree upon terms with the distributor, then the other exhibitors in the split of product arrangement attempt to license that particular motion picture. A split of product can be by company or by picture. In a company split, the participating exhibitors agree that a member thereof shall have the right to negotiate for the pictures released by a given company prior to any other members so doing. In a picture split, the participants agree that a member thereof shall have the right to negotiate for a particular picture prior to the other members so doing.

History of Motion Picture Exhibition in Las Vegas

8. Prior to 1965 there were two exhibitors of first-run pictures in the Las Vegas market, Nevada Theatre Corporation and Lucille M. Cragin. NTC

owned and operated the Guild, Huntridge and Fremont,[1] all walk-in theatres. Cragin owned the El Portal theatre, a walk-in. These two exhibitors never owned theatres outside of Las Vegas.

9. During the period 1951 to 1965 there was a split of product arrangement between NTC and Cragin. This split of product arrangement was by company. During its existence both Cragin and NTC exhibited films on an exclusive basis only at their theatres.

10. National General entered the Las Vegas market by acquiring the Nevada Drive-In Theatre prior to March 1965 and opening the Fox Charleston Walk-In Theatre in March 1965. The split of product arrangement between Cragin and NTC ended sometime in 1965. The Nevada Drive-In Theatre failed to establish itself as a first-run motion picture theatre on an exclusive basis and thereafter exhibited subsequent-run motion pictures on an exclusive basis. The Fox Charleston Walk-In Theatre established itself as a first-run motion picture theatre on an exclusive basis in the Las Vegas market.

11. In 1965 another exhibitor entered the Las Vegas market. Cinerama Theatre constructed a theatre to exhibit "road show" or "hard ticket" pictures on long engagements for which patrons bought tickets in advance on a reserved-seat basis for designated performances at premium prices. This was the only theatre operated by it in the Las Vegas market during the complaint period. For the duration of this

[1]The Fremont was torn down in 1974.

road show or hard ticket policy Cinerama Theatre did not compete with other theatres in the Las Vegas market for the licensing of motion pictures.

12. In 1966 plaintiff opened the Las Vegas Drive-In Theatre. From the theatre's inception plaintiff requested first-run pictures for exhibition at its drive-in theatre on a day and date basis only with one walk-in theatre in the Las Vegas market. At that time, in addition to the Nevada Drive-In, the other drive-ins in the Las Vegas market were the Skyway and the Sunset, each of which was playing subsequent run.[2] To acquire the drive-in run of first-run motion pictures on a day and date basis with one walk-in, plaintiff requested bidding against the other drive-in theatres in the Las Vegas market. To acquire films on an exclusive basis, plaintiff bid against all walk-in and drive-in theatres in the Las Vegas market. There was no evidence that in the Las Vegas market during the complaint period any distributor offered to license its motion pictures on a day and date basis only to one drive-in and one walk-in theatre.

13. In 1966 and 1967 there was bidding among the exhibitors of first-run motion pictures, including plaintiff, for licenses to exhibit motion pictures in the Las Vegas market. All exhibitors exhibited motion pictures on an exclusive basis. NTC and Cragin continued the first-run exclusive policy they had fol-

[2]These theatres were and are owned by Sero Amusement Corporation, a non-party herein. There was no evidence introduced by plaintiff that these drive-ins played on anything other than an exclusive basis.

lowed since the 1950's. National General's first-run exclusive policy was consistent with its policy in other areas in which it operated theatres, i.e., not to play day and date with any other theatre. Cinerama Theatre continued to exhibit road show pictures not available for day and date exhibition.

14. In August of 1967 the Bonanza Theatre opened in Las Vegas, located adjacent to the Bonanza Hotel. It was operated by the Walter Reade organization in New York, a non-party. This theatre played exclusive first-run pictures with some sub-run pictures. It closed in late 1970 at the time the hotel closed. At no time did plaintiff request the Bonanza Theatre to play day and date with plaintiff's drive-in theatre and at no time did plaintiff offer to play his drive-in theatre day and date with the Bonanza Theatre.

15. In 1968, National General opened a second walk-in theatre in Las Vegas, the Fox Boulevard. In that year a split or product arrangement was entered into among NTC, Cragin and National General with reference to first-run motion pictures in the Las Vegas market. Plaintiff's Las Vegas Drive-In Theatre and the Bonanza Theatre bid against the exhibitors in the split arrangement. There is no evidence that plaintiff at that time requested entry into the arrangement. Nor is there any evidence that plaintiff was refused or would have been refused such entry. The split arrangement remained effective during 1968 and terminated thereafter. During that year plaintiff and the Bonanza licensed first run motion pictures exclusively by bidding or negotiating against the individual

member of the split negotiating or bidding for each picture. Plaintiff does not claim this 1968 split arrangement had any effect upon it and in fact it did not. The split arrangement reduced the number of competitors against whom plaintiff was required to bid or negotiate for first-run motion pictures in the Las Vegas market.

16. In 1969 and 1970 all exhibitors of first-run motion pictures in the Las Vegas market bid and negotiated for first-run pictures on an exclusive basis. By late 1969 few road show pictures were being produced and Cinerama Theatre began competing for first-run pictures on an exclusive basis.

17. In 1970 ABC opened the ABC Parkway Theatre in the Las Vegas market, a walk-in theatre. ABC bid and negotiated for first-run product on an exclusive basis.

18. In 1971 NTC, Cragin (for the El Portal Theatre), Cinerama Theatre, ABC, National General and the plaintiff entered into and participated in a split of product arrangement for first-run motion pictures on an exclusive basis in the Las Vegas market. Plaintiff voluntarily withdrew from this arrangement in September or October 1971, and it terminated several months thereafter.

19. During the existence of the 1971 split of product arrangement, all of the members thereof exhibited first-run motion pictures on an exclusive basis. Subsequent to the termination of the split arrangement, the former members continued to play pictures on an

exclusive first-run basis. In 1973 Mann Theatres (a non-party) bought National General's theatres in the Las Vegas market. Mann too thereafter exhibited motion pictures on an exclusive first-run basis only in the Las Vegas market. Also in 1973, Plitt Theatres (a non-party) bought ABC's Parkway Theatre. Plitt thereafter exhibited films on an exclusive first-run basis only in the Las Vegas market.

20. There is no evidence of defendants agreeing among themselves or with anyone else not to exhibit motion pictures day and date with plaintiff in the Las Vegas market. Each of the defendants bid or negotiated for pictures on an exclusive first-run basis because they believed they would earn more money exhibiting motion pictures on that basis.

21. In 1966 Cragin built the Red Rock Theatre. The Red Rock Theatre originally failed to establish itself as a first-run motion picture theatre and thereafter played subsequent-run pictures. In 1971 the Red Rock became a four-plex theatre with the additions of Red Rock screens 2, 3 and 4. In 1972 it became a six-plex and in 1973 it became an eleven-plex theatre with the additional Red Rock screens 5, 6, 7, 8, 9, 10 and 11. The policy of these theatres has been to play exclusive first-run where such motion pictures were available and all the Red Rock Theatres have so exhibited pictures.

22. The Las Vegas Drive-In is presently a four-plex theatre. Screens 3 and 4 were added subsequent to the damage period of this lawsuit.

23. The evidence is that in 1966 plaintiff had 19 screens in various areas of the United States. Plaintiff now has 114 walk-in and drive-in screens. Many of plaintiff's walk-in theatres in other market areas maintain an exclusive policy. In the years immediately following the opening of the Las Vegas Drive-In in 1966, plaintiff built a number of walk-in theatres in Northern and Southern California and Nevada but did not build a walk-in theatre in the Las Vegas market.

24. Drive-in and walk-in theatres compete for patrons. Some patrons go only to walk-in and others go only to drive-in theatres. There is an overlap of patrons who go to either theatre, depending upon the picture playing.

25. Distributors decide to whom they will license their motion pictures on the basis of earning the most money in each market area.

26. During the complaint period only Paramount offered some motion pictures in the Las Vegas market on an either/or basis.[3] No distributor offered any of its motion pictures on a day and date basis only during the complaint period.

27. The exhibitors in Las Vegas making offers on motion pictures offered for exclusive first-run exhibition could not offer to license those pictures on a day and date basis consistent with the terms of the bid invitation. Thus, on the vast majority of pictures offered during the four-year complaint period, de-

[3]And perhaps one other unidentified distributor.

fendants were not able to license motion pictures for exhibition in the Las Vegas market on a day and date basis even if they chose to do so.

28. There is no evidence as to which motion pictures were offered by which distributor or distributors on an either/or basis during the complaint period.

29. There is no evidence from which it could be determined or even inferred plaintiff would have earned more money exhibiting motion pictures on day and date basis than it earned on the pictures it exhibited. Plaintiff was not deprived at any time of an opportunity to license first-run motion pictures on an exclusive basis. In fact it opened its Las Vegas Drive-In on January 4, 1966 with a first run film "DO NOT DISTURB" released by Warner Bros. During the four-year statutory period it filled approximately 40% of its theatre playtime with first-run motion pictures.

30. There is no evidence as to the percentage of first-run playtime in any of defendants' theatres in the Las Vegas market during the complaint period.

31. There is no evidence defendants or any of them entered into a combination, conspiracy or contract in restraint of trade in violation of Section 1 of the Sherman Act.

32. There is no evidence the actions of defendants or any of them constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

33. There is no evidence the actions of defendants or any of them had any injurious impact upon plaintiff in violation of Section 1 of the Sherman Act.

34. There is no evidence the actions of defendants or any of them damaged plaintiff in violation of Section 1 of the Sherman Act.

35. There is no evidence defendants or any of them attempted to monopolize trade and commerce or combined or conspired to do so in violation of Section 2 of the Sherman Act.

36. There is no evidence the actions of defendants or any of them had any injurious impact on plaintiff in violation of Section 2 of the Sherman Act.

37. There is no evidence the actions of defendants or any of them damaged plaintiff in violation of Section 2 of the Sherman Act.

38. There is no evidence defendants or any of them combined, conspired or agreed with distributors alleged as coconspirators or any of them to prevent and exclude plaintiff from exhibiting motion pictures first-run at plaintiff's theatres in the Las Vegas market.

39. There is no evidence defendants or any of them negotiated with distributors alleged to be coconspirators on a circuit basis rather than picture-by-picture, and theatre-by-theatre, and there is no evidence defendants or any of them used economic power to prevent day and date first-run exhibition in the Las Vegas market.

40. There is no evidence defendants or any of them combined, conspired or agreed with distributors alleged to be coconspirators or any of them to prevent and exclude plaintiff from exhibiting motion pictures

first-run at plaintiff's theatres in the Las Vegas market.

41. To the extent that any of the following conclusions of law in whole or in part constitute findings of fact, they are incorporated herein by this reference as though fully set forth herein.

CONCLUSIONS OF LAW

1. None of the defendants entered into a combination, contract or conspiracy in restraint of trade in violation of Section 1 of the Sherman Act.

2. The actions of defendants and each of them did not constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

3. The actions of defendants and each of them did not have any injurious impact upon plaintiff in violation of Section 1 of the Sherman Act.

4. The actions of defendants and each of them did not damage plaintiff in violation of Section 1 of the Sherman Act.

5. None of the defendants monopolized trade and commerce or combined or conspired to do so in violation of Section 2 of the Sherman Act.

6. The actions of defendants and each of them did not have injurious impact upon plaintiff in violation of Section 2 of the Sherman Act.

7. The actions of defendants and each of them did not damage plaintiff in violation of Section 2 of the Sherman Act.

8. To the extent any of the foregoing findings of fact constitute conclusions of law in whole or in part, they are incorporated herein by this reference as though fully set forth herein.

ORDER

A Directed Verdict shall be entered accordingly and defendants shall be awarded costs.

Dated: 8/14/75

/s/ Roger D. Foley
United States District Court Judge

Prepared and submitted by:

Harry B. Swerdlow
Alian Albala
Nathan Goldberg, Members of
Swerdlow, Glikbarg & Shimer
A Professional Corporation

/s/ By Nathan Goldberg
Nathan Goldberg
Attorneys for Defendants

Supreme Court, U. S.
FILED
OCT 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-266

SYUFY ENTERPRISES, a partnership, successor in interest to original plaintiffs, LAS VEGAS DRIVE-IN THEATRE, INC., SMOKE RANCH DRIVE-IN THEATRE, INC., LAS VEGAS THEATRE CORPORATION, and CONFECTION CORPORATION OF LAS VEGAS, INC.,

Petitioner,

vs.

NATIONAL GENERAL THEATRES, INC., ABC INTERMOUNTAIN THEATRE CO., NEVADA THEATRE CORPORATION, SOUTHWEST AMUSEMENT CORPORATION, LUCILLE MARLEAU CRAGIN, dba EL PORTAL THEATRE, and LAS VEGAS CINERAMA THEATRE CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

HARRY B. SWERDLOW,
SWERDLOW, GLIKBARG & SHIMER,
A Professional Corporation,
544 United California Bank Building,
9601 Wilshire Boulevard,
Beverly Hills, Calif. 90210,
Attorneys for Respondents.

Of Counsel:
ALLAN ALBALA,
315 South Beverly Drive, Suite 315,
Beverly Hills, Calif. 90212.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-266

SYUFY ENTERPRISES, a partnership, successor in interest to original plaintiffs, LAS VEGAS DRIVE-IN THEATRE, INC., SMOKE RANCH DRIVE-IN THEATRE, INC., LAS VEGAS THEATRE CORPORATION, and CONFECTION CORPORATION OF LAS VEGAS, INC.,

Petitioner,

vs.

NATIONAL GENERAL THEATRES, INC., ABC INTERMOUNTAIN THEATRE CO., NEVADA THEATRE CORPORATION, SOUTHWEST AMUSEMENT CORPORATION, LUCILLE MARLEAU CRAGIN, dba EL PORTAL THEATRE, and LAS VEGAS CINERAMA THEATRE CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

This brief is submitted by respondents National General Theatres, Inc. ("National General"), ABC Intermountain Theatre Company ("ABC") and Las Vegas Cinerama Theatre Company ("Las Vegas Cinerama") in opposition to the Petition for a Writ of Certiorari filed by petitioner Syufy Enterprises, a partnership, et al. ("Syufy").

Questions Presented.

Petitioner's statement of Questions Presented for Review as well as its Statement of the Case fail to present the issues raised and considered by the District Court or by the Court of Appeals and fail to accurately present the facts disclosed by the evidence upon which the District Court's decision was based and affirmed by the Court of Appeals. Respondents, therefore, are required to present a Counter Statement of Issues Presented for Review and Statement of the Case.

Within the context of such issues and facts this Court will conclude, as did the District Court and Court of Appeals, that there was insufficient evidence to present any issue of material fact to the jury.

Counter Statement of Issues Presented for Review.[1]

1. Is there sufficient evidence in the record from which a reasonable jury could conclude respondent exhibitors entered into an agreement not to license and exhibit first-run motion pictures day and date with petitioner's drive-in theatres in Las Vegas, Nevada?

2. Assuming *arguendo* any such agreement, was there sufficient evidence from which a reasonable jury could conclude that such agreement had any adverse effect on petitioner?[2]

[1]The abbreviations "Cl. R.," "Tr.," "Ex." and "PB" refer respectively to "Reporter's Transcript," "Transcript," "Exhibit" and "Petitioner's Brief."

[2]The Court of Appeals, holding that there was insufficient evidence as to liability, including the fact of damage, did not discuss the damage (amount) issue as to which the District Court had found adversely to petitioner. (Cl. R. 221, 222, paras. 29, 34.)

3. Did the Court of Appeals below properly affirm the directed verdict entered by the District Court?

Counter Statement of Facts Relevant to Issues Presented for Review.

1. Nature of the Case.

The original complaint (filed November 1971) against respondents, under Section 4 of the Clayton Act (15 U.S.C. §15), sought damages for violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2).[3] A counterclaim on behalf of all respondent-defendants other than Nevada Theatre Corporation ("NTC") charged that petitioner, together with others, was engaged in a conspiracy using litigation, threats of litigation, coercion of motion picture distributors and fabrication of evidence, to eliminate and prevent competition between petitioner's theatres and those owned and operated by respondents and others in Las Vegas, Nevada and in various other areas in the Western United States. The counterclaim was tried before the same jury approximately 12 months after the motion for directed verdict was granted. A mistrial as to the counterclaim was declared because of possible jury contamination brought to the attention of the District Court by respondents' counsel, although the court be-

[3]Petitioner's complaint and the Pretrial Statement alleged an unlawful monopolization of the exhibition of first-run motion pictures in Las Vegas, Nevada pursuant to Section 2 of the Sherman Act. The District Court's finding that there was no evidence of any violation of Section 2 of the Sherman Act, Cl. R. 222, was not contested by petitioner in its appeal to the Ninth Circuit Court of Appeals and is not raised by petitioner in its petition to this Court.

lieved the counterclaim should go to the jury on the facts as presented. (Tr. April 8, 1976, 22-25.)[4]

NTC was dismissed prior to trial as a result of a "settlement" agreement with petitioner, which agreement precluded NTC from competing for licenses of first-run motion pictures in Las Vegas, Nevada except as determined by petitioner.[5] (Tr. 319-320, 325-326, Ex. 1.)

After the presentation of petitioner's case, respondents moved for a directed verdict on the following grounds: (1) there was neither evidence of the violations of law alleged in the complaint and the pretrial order, nor of any impact or damages resulting from such alleged violations; (2) neither the complaint nor the pretrial order presented as an issue any claim

[4]The District Court commented during the argument on the Motion for Directed Verdict, although all evidence had not been presented on the counterclaim, that there was already sufficient evidence to go to the jury. (Tr. 3198.) As held in *Beacon Theatres, Inc. v. Westover*, 252 F.2d 864 (9th Cir. 1958), rev'd on other grounds, 359 U.S. 500, 79 S.Ct. 948, the right ". . . to negotiate for contracts [for exclusive licenses] as part of its normal method of doing business is as much entitled to protection as any property or contract right in the more traditional sense." (252 F.2d at 872.)

[5]Mr. Katz, chief executive officer of NTC, testified the agreement was entered into *not* because he believed it to be in the best interest of his company, but because of the substantial legal expenses being incurred in this action, as well as the severe competition in the marketplace. (Tr. 639-641.) The District Court had serious reservations as to the propriety of the agreement (Tr. 3209, 3211), which precluded NTC from bidding exclusively in Las Vegas on any motion pictures which had been licensed for exhibition day and date in Orange County, California, an area Mr. Katz stated had nothing to do with Las Vegas. (Tr. 1908.) The agreement did not preclude plaintiff from bidding and playing exclusively in Las Vegas. (Tr. 1884-85.) NTC, in spite of this agreement, still attempts to play motion pictures exclusively and offers the distributor higher rental terms for exclusive first-run as opposed to day and date exhibition (Tr. 316-319), over petitioner's objection. (Tr. 320.)

of agreement among defendants to prevent petitioner from playing first-run motion pictures on a day and date basis; (3) alternatively, in the event the District Court considered this as an issue before it, there was insufficient evidence of any such agreement, and such agreement could not result reasonably in any impact on petitioner; and (4) there was insufficient evidence of any damage suffered by petitioner by reason thereof. (Tr. 2969, *et seq.*)

On June 27, 1975, respondents' motion for directed verdict was "granted upon all the grounds argued to this court . . ." and "defendants' counsel [were] directed to prepare and submit . . . proposed findings of fact and conclusions of law . . . in accordance with Local Rule 19 of this Court." (Cl. R. 279, entry 6/27/75.) The findings of fact and conclusions of law were requested by the District Court in lieu of an opinion. (Tr. April 8, 1976, p. 17.) No objections were filed by petitioner to the findings of fact or conclusions of law.

2. The Parties and Las Vegas Theatre History.

The original plaintiffs were four corporations named in the caption of the complaint. (Cl. R. 1.) Prior to trial, these corporations were merged into a limited partnership, known as Syufy Enterprises. Just prior to opening the Las Vegas Drive-In No. 1 (January 1966) petitioner owned and operated nineteen theatres in California and Utah; fifteen drive-ins and four walk-ins. (Tr. 1393-1399.) As of the date of trial (April 1975), petitioner owned and operated more than one hundred theatre screens, including thirty-eight walk-in screens, but no walk-in screens in Las Vegas, Nevada.

The Fox Las Vegas Theatre and Boulevard Theatre (walk-in theatres) owned and operated by National General, opened in March 1966 and April 1968 respectively. (Cl. R. 61, 65.) During the relevant period (the opening of petitioner's drive-in, 1966, to the filing of the complaint), National General also owned and operated the Nevada Drive-in Theatre, Las Vegas. (Cl. R. 215, para. 10, Tr. 120.) The Las Vegas Cinerama Theatre (walk-in), owned and operated by Las Vegas Cinerama, opened in January 1965; the Parkway Theatre (walk-in), owned and operated by ABC, opened in February 1970. (Cl. R. 61, 65.) The Guild, Fremont and Huntridge Theatres (walk-ins), owned and operated by former defendant NTC were in existence as of January 1966, when petitioner's first drive-in opened (Tr. 61, 65), as was the El Portal (walk-in), owned and operated by Cragin. The Red Rock Theatres, now consisting of an eleven screen walk-in complex, commenced operations in 1966 with the opening of the Red Rock No. 1 (Tr. 107) followed by the opening of ten additional screens in 1972-1973. (Tr. 819-821, Cl. R. 219, para. 21.) These theatres are owned and operated by Cragin Industries, a non-party. (Tr. 802-803.) No claim was made in the complaint, pretrial order or at trial that the Red Rock Theatres were part of any unlawful conduct or plan.

The named non-party co-conspirators were and are the eleven major distributors of motion pictures, suppliers of motion pictures to all Las Vegas theatres. None were called to testify as witnesses or by deposition. (Cl. R. 62-63.)

Additional theatres operated in the Las Vegas market during the relevant period and continue to operate

today. There were and still are other drive-in theatres operated by non-parties. (Tr. 263.) A walk-in theatre, the Bonanza, was owned and operated by a non-party from August 1967 through November 1970. (Tr. 309, 643.) This theatre closed when the premises it occupied were no longer available. (Tr. 643.) The Four Star Theatre (walk-in) was owned and operated by a non-party from 1966 to 1971. The Bonanza and Four Star Theatres competed for the same motion pictures exhibited by respondents and petitioner. (Tr. 232, 284-285, 498.)

There has been no restriction in the growth of theatres in Las Vegas, Nevada. At the present time there are more than 27 walk-in screens and 12 drive-in screens. (Tr. 400-402, 641.) Subsequent to the filing of the complaint, the theatres previously owned and operated by National General (Fox Las Vegas, Fox Boulevard and Nevada Drive-In) were acquired by an exhibitor known as Mann Theatres, and the ABC Parkway Theatre by an exhibitor known as Plitt Theatres. Neither Mann nor Plitt are parties to this action, nor are any claims made as to them although they too exhibited pictures in Las Vegas on a first-run exclusive basis only. (Tr. 402-403, 724-726.) The Parkway and Charleston Theatres have been expanded into multi-screen walk-in theatres. (Tr. 725.) Former defendant NTC opened three additional walk-in screens known as the Cinema 1, 2 and 3. (Tr. 717.)

From its opening in 1965, the Las Vegas Cinerama Theatre exhibited road show pictures.[6] It therefore did not compete for first-run motion pictures against

[6]A road show picture, sometimes referred to as a hard ticket picture, is a motion picture exhibited on a reserved seat basis at a walk-in theatre for designated performances at premium prices. (Cl. R. 216.)

petitioner's drive-in or any walk-in theatres in Las Vegas until the end of 1969, when road show pictures became scarce. (Tr. 131, 136-137.)

3. Competition Among Theatres in the Las Vegas Market.

Petitioner's witnesses testified that theatres in the Las Vegas market were extremely competitive to each other. It was admitted that if a drive-in theatre played the same motion picture at the same time as a walk-in theatre (a day and date run), patronage at the walk-in theatre would be diluted anywhere from 25 to 35%. (Tr. 460, 1443-1445, 1456-1457.) Lloyd Katz, another exhibitor witness presented by petitioner, testified that a 10% drop in patronage at the NTC walk-in theatres would be substantial as it would have a substantial effect upon income. (Tr. 711.) Petitioner's counsel pointed out the Las Vegas theatre market is small, no more than five miles in radius (Tr. 494), with all theatres within short driving time and distance to each other. (Tr. 1794-1797, Ex. AR.) In response to the Court's questions, Raymond Syufy, petitioner's principal, admitted that 90% of a theatre's patronage came from within a five-mile radius. (Tr. 1297.)

Mr. Syufy further admitted that two separate geographical areas were necessary for a drive-in and a walk-in to successfully play a motion picture day and date (Tr. 1684-89), a conclusion similarly reached by Arnold Shartin, an executive and film buyer for petitioner during the relevant time period. (Tr. 1688, 1768-1775.) No evidence was offered or introduced to establish these two separate geographical areas in fact existed in the Las Vegas area.

Raymond Syufy admitted petitioner was not complaining about motion pictures exhibited exclusively

elsewhere as well as in Las Vegas, but only about those which played "day and date first-run" elsewhere but exclusively in Las Vegas. (Tr. 1284, 1418, 1436, 1866.) No evidence was offered or introduced as to which pictures played day and date first-run elsewhere but not in Las Vegas.

During the relevant period, respondents' individual policies were to operate their theatres on an exclusive first-run basis. (Tr. 262, 263, 287, 293, 885.) Similarly, during the same period the Bonanza Theatre, a non-party, had a policy of operating its theatre on an exclusive first-run basis. The Mann and Plitt entities (non-parties against whom no claim was made), which acquired the Las Vegas theatres operated respectively by defendants National General and ABC subsequent to the filing of the complaint, both had a policy of operating their theatres on an exclusive first-run basis. (Tr. 308, 309, 724-726, Cl. R. 219, para. 19.)

No evidence was offered or introduced as to how many pictures actually were played at any of respondents' theatres during the relevant period on an exclusive first-run basis. During this same period, however, petitioner's drive-in theatres exhibited motion pictures on a first-run exclusive basis at least 40% of the time. (Tr. 354-363, 367-375, 645-646, Cl. R. 221.) In fact, Lloyd Katz testified that NTC lost motion pictures to plaintiff on bids for first-run exclusive exhibition during this period. (Tr. 247.)

The evidence is undisputed that an exclusive first-run results in a higher box office gross (Tr. 287, 305, 669) for which theatre exhibitors, including petitioner, are willing to pay a high film rental. (Tr. 318, 642, 1431-1445, Exs. AB, AC.) In areas other

than Las Vegas, where petitioner operates walk-in and drive-in theatres, all petitioner's walk-in theatres generally played exclusive first-run although petitioner could have played its walk-ins day and date with its own and/or other drive-ins in these areas. (Tr. 1639-1660, 1663-1671, 1674, 1680-1682.) Petitioner claimed this was the result of some other conspiracy. (Tr. 1875-1879.) In Vallejo, California, for example, where petitioner owns all the drive-ins and walk-ins, petitioner exhibited pictures in its walk-ins on an exclusive first-run basis, allegedly over its own objection. (Tr. 2326-2327.)

The evidence is undisputed that the distributor must look at the entire market, all possible runs, to determine the maximum return it is able to realize, *i.e.*, distributing exclusive first-run followed by subruns compared with distributing day and date which practically eliminates subruns (Tr. 155-156, 519, 1474-1478); that if a distributor believed it could earn more distributing its motion pictures day and date as opposed to exclusively followed by subruns, it would offer its pictures day and date only. (Tr. 722.) Even petitioner's damage witness admitted he could not tell if a distributor would do better in the Las Vegas market licensing motion pictures exclusively followed by subruns or on a day and date basis. (Tr. 2641-2643.)

4. Split of Products History in Las Vegas, Nevada.

Petitioner, at the time of trial, admitted it was not claiming damage resulting from a split of product. (Tr. 1142.) Nevertheless, petitioner bases almost its entire argument on splits of product in Las Vegas in 1968 and 1971. Petitioner's failure to set forth the facts as to the limited split of product which existed (which

for one of the two periods, 1971, included petitioner) requires respondents to include this statement.

The definition of a split of product set forth in petitioner's brief (PB 6) is without reference to the record. As presented, the definition is inaccurate. It is correctly defined in the findings of fact (petitioner does not argue this finding of fact is in error) as follows:

> "A split of product (motion pictures) basically is an arrangement among participating exhibitors in a market area entered into with the knowledge and consent of distributors. The participants therein agree that a member thereof shall have the first right to negotiate with a licensing distributor. If such exhibitor is not able to agree upon terms with the distributor, then the other exhibitors in the split of product arrangement attempt to license that particular motion picture. A split of product can be by company or by picture. In a company split, the participating exhibitors agree that a member thereof shall have the right to negotiate for the pictures released by a given company prior to any other member's so doing. In a picture split, the participants agree that a member thereof shall have the right to negotiate for a particular picture prior to the other member's so doing." (Cl. R. 214-215, para. 7(f), Tr. 92-93.)

Splits of product existed in the Las Vegas market for *only* limited periods of time among *only certain exhibitors.* There was a split of product between the *only* two theatre exhibitors in Las Vegas during the period 1951 to 1965. (Tr. 100-113.) There was no split of product in 1966 or 1967. All then existing

theatres[7] were bidding. (Tr. 124-125, 138-142, 144-145, 200-201, 295, 306.)[8] In 1968, a split of product arrangement existed among *only* National General, Cragin (the El Portal Theatre only) and former defendant NTC. (Tr. 124-125, 138-142, 145.) Contrary to petitioner's citation to the record, there was no split in 1969 and no split meetings, as there was "all out bidding." (Tr. 141.)

In 1971, there was a split of product in which *petitioner,* NTC, National General, ABC, Las Vegas Cinerama and Cragin participated.[9] (Tr. 142, 1359-1377.) Petitioner withdrew from this split in September 1971 only after it "got what [it] wanted." (Tr. 1371-1374.) This litigation was commenced soon thereafter in November 1971.[10] The split from which petitioner withdrew in September 1971 terminated after several months, as admitted in petitioner's brief to the court below.[11] No evidence was offered or introduced regarding any distributor's disapproval or objection to the split of product arrangement, but it was undisputed that distributors were advised of the 1968 and 1971 split. (Tr. 150, 1376.)

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[7]ABC did not have a theatre in Las Vegas until February 1970, *supra,* p. 6.

[8]Except the Las Vegas Cinerama Theatre which was playing road show pictures and not competing for the same types of pictures as other theatres. (See pp. 7-8, *supra.*)

[9]The Red Rock Theatres were not part of this split arrangement. (Tr. 905-906.)

[10]Petitioner's counsel at one point in the proceedings stated he would accept Katz's testimony on the history of the split (Tr. 295), but then withdrew this offered stipulation. No evidence, however, contradicting this split history was introduced.

[11]Petitioner's opening brief to the Ninth Circuit Court of Appeals stated at page 9 that the 1971 split, which included petitioner, terminated several months after petitioner withdrew in September 1971.

A split of product is not an unusual arrangement. Petitioner has participated in such arrangements for many years with other exhibitors in other geographical areas as well as in Las Vegas. (Tr. 1048-1049, 1051, 1722, 1726, 1750, 1762-1763, 1764.) As Raymond Syufy testified, theatres work out a split in order to avoid "killing each other off." (Tr. 1284-1285.)[12]

5. The Distribution Method Demanded by Petitioner.

Petitioner admitted it wanted distributors to offer and license motion pictures in the Las Vegas market on a first-run day and date basis *only.* (Tr. 917, 948, 1390, 1990, 1997.) Lloyd Katz, petitioner's witness, admitted that petitioner advised him it did not want NTC to play any pictures other than day and date (Tr. 200, 319-328); so did witness Schmidt. (Tr. 868-872, 920.) It is undisputed this method of distribution and exhibition would insulate drive-ins from competing with walk-ins for licenses to exhibit first-run pictures, thereby resulting in less film rental to the distributors from the drive-ins. (Tr. 405.)

At the time of trial, there were seven drive-in screens in Las Vegas and twenty-five walk-ins. (Tr. 400-402, 641.) Las Vegas, being an extremely competitive theatre market required exhibitors to offer distributors substantial guarantees and advances of film rental as well as high terms to obtain licenses to exhibit first-run motion pictures. (Tr. 408-410, 641-643.) It is easier for new theatres, such as petitioner's drive-ins, to break into this competitive market through day and date exhibitions, since this eliminates competition with walk-ins. (Tr. 258.) Throughout the relevant period, petitioner's

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[12]The suicidal nature of bidding was recognized by the Court in *Brown v. Western Massachusetts Theatres, Inc.,* 288 F.2d 302, 305 (1st Cir. 1961).

drive-ins were bidding for exclusive first-runs (Tr. 2373, Exs. BD, BE), and in fact were bidding for exclusive second and third runs (Tr. 2356, Ex. BA), because of competition from others.[13] Petitioner preferred to play second run exclusive in a bidding situation rather than day and date with a walk-in without bidding (Tr. 2257-2258), entirely contrary to its temporary preference for first-run day and date rather than exclusive.

Outbid for pictures for exclusive first-run (Tr. 1037-1038, 1341-1346), petitioner desired a day and date policy for its drive-in screens temporarily to build its financial resources and then compete more vigorously for exclusive first-runs for its drive-in screens. (Tr. 681-682.) Petitioner presses this day and date policy temporarily on exclusive first-run for its drive-in screens with other exhibitors' walk-ins in Las Vegas at the same time as it is playing on an exclusive first-run policy in substantially all of its walk-in screens in other areas even with its own drive-in screens in those areas. (See pp. 9-10, *supra.*) At the same time petitioner insists on playing its drive-in screens in Las Vegas exclusively rather than day and date on second and third run Las Vegas.

6. Distributors Did Not Offer Motion Pictures in Las Vegas, Nevada on a Day and Date Basis During the Relevant Period.

Contrary to petitioner's unsupported assertion regarding the manner in which distributors offered motion pictures in Las Vegas (PB 6), no evidence was offered

[13]Bidding and playing first, second and third run exclusive in its drive-ins in Las Vegas is inconsistent with petitioner's expressed position that day and date first-run in Las Vegas is better for exhibitor *and* distributor.

or introduced as to which pictures or how many pictures during the relevant time period were offered first-run Las Vegas on an exclusive or "either/or basis" and no evidence was offered or introduced that any pictures were offered by any distributor on a day and date basis only. At most, the evidence may indicate that Paramount Pictures Corporation and one other unidentified distributor offered *some* pictures of an unspecified "class" on an "either/or" basis. (Tr. 260-262, 465-466, 1789, 1842, 2147-2149, 2226-2236.) No evidence was offered or introduced as to which pictures, when, or how many. No evidence was offered or introduced as to which theatres exhibited these pictures or that petitioner itself did not exhibit them first-run exclusive.

Petitioner did not call any film distributor representative as a witness and did not subpoena any documents from any film distributor. The only documents introduced into evidence as to how pictures were offered by distributors in Las Vegas during the relevant period indicate that all pictures, first and second run, were offered exclusive. (Exs. AG, AH, BB, BC, Tr. 1507, 1510, 2357, 2377.) It was undisputed that distributors interested in maximizing profit determine in their best interests how to offer motion pictures to exhibitors. (Tr. 255-256, 318, 722, 1874.)

As alleged in respondents' counterclaim, petitioner's claims against respondents were made to coerce non-party film distributors to license all motion pictures "day and date" in the Las Vegas market, by coercing defendant exhibitors to exhibit these motion pictures in the manner petitioner dictates as petitioner did with NTC through a purported "settlement" agreement. (P. 4, fn. 5, *supra.*)

THERE IS NO FACTUAL OR LEGAL BASIS FOR REVIEW BY THIS COURT.

Petitioner's basic argument to this Court is that all antitrust cases should be submitted to the jury and summary procedures avoided. This Court, however, has consistently held that, when used with care, summary procedures have a place in the antitrust field, as elsewhere. *White Motor Company v. United States,* 372 U.S. 253 (1963).

I

There Was Insufficient Evidence From Which Any Reasonable Jury Could Conclude Respondents Entered Into an Agreement Not to Play Day and Date With Petitioner's Drive-in Theatres in Las Vegas, Nevada, on First-Run Motion Pictures.

Neither the Court of Appeals nor the District Court ignored or misstated the evidence or improperly drew conclusions therefrom. Petitioner's entire argument is based on the premise that a jury should be permitted to draw unreasonable conclusions from uncontroverted evidence adverse to petitioner's claim. The Court below, quoting from its recent opinion in *Calnetics Corp. v. Volkswagen of America, Inc.,* 532 F.2d 674 (9th Cir. 1976), *cert. denied,* 429 U.S. 940, correctly applied a strict standard of review in sustaining the entry of the directed verdict. This was and is the same standard of review used in all other circuits and by this Court. *Sartor v. Arkansas National Gas Corporation,* 321 U.S. 620 (1944). A mere scintilla of evidence is not enough to avoid either a motion for summary judgment or a directed verdict; nor can a case be submitted to a jury when reasonable men cannot draw the inferences asserted by the party bearing the burden

of proof. *Dahl, Inc. v. Roy Cooper Co.,* 448 F.2d 17 (9th Cir. 1971); *Shumate & Co., Inc. v. National Ass'n of Sec. Dealers, Inc.,* 509 F.2d 147, 153 (5th Cir. 1975).

There have been numerous summary judgments and directed verdicts granted in favor of defendants in motion picture antitrust cases. Among these are *Dahl, Inc. v. Roy Cooper Co., supra; Brown v. Western Massachusetts Theatres, Inc.,* 288 F.2d 302 (1st Cir. 1961); *Viking Theatres Corp. v. Paramount Film Distributing Co.,* 320 F.2d 285 (3d Cir. 1963), aff'd *per curiam,* 378 U.S. 123; *Seago v. North Carolina Theatres, Inc.,* 42 F.R.D. 627 (E.D.N.C. 1967), aff'd 388 F.2d 987 (4th Cir. 1967), *cert. denied,* 390 U.S. 959 (1968).

Petitioner's entire claim that there was sufficient evidence to go to the jury on the issue of whether respondents entered into an agreement not to play day and date first-run with petitioner's drive-ins is based upon the alleged testimony of two witnesses. Petitioner cites partial and selectively distorted testimony of these two witnesses, Emmett Shane, an employee of petitioner (Tr. 761), whom petitioner identifies as an "independent witness" (PB 8) and Raymond Syufy, general partner of petitioner. The testimony of neither witness supports the conclusion stated on any reasonable basis.

The complete testimony of Shane shows nothing more than an independent decision by National General not to play day and date in Las Vegas, Nevada, consistent with its policy to maintain exclusivity in other areas involving all of its theatres. Shane's testimony, including the portion quoted by petitioner, was as follows:

"Q. After the distributor contacted you, whatever the distributor said to you, did you then have a conversation as a result of your conversation with Mr. Spencer, with Mr. Adams?

A. Yes, sir, I did.

Q. What did Mr. Adams say to you?

MR. ALBALA: Your Honor, I'd just like to know what period of time we're talking about?

THE COURT: He said '73.

THE WITNESS: October '72—October or Fall of '72."[14] (Tr. 775-776.)

"Q. What did Mr. Adams say to you?

A. I told Mr. Adams—

THE COURT: No. What did Mr. Adams tell you?

A. Mr. Adams told me not to worry about the three 20th Century Fox motion pictures, that Fox wanted to go day and date on them in Las Vegas—not to worry about it because no one was going to play day and date on these three pictures.

Q. Did you say anything in response to that to Mr. Adams?

A. I was concerned because this was a period in the split where we were experiencing some difficulty, and I was concerned that maybe there's always—maybe a split is going to blow up and someone would go day and date on one or two of three of these pictures. But he assured me

[14]Since the 1971 split ended several months after petitioner withdrew in September 1971, Shane must be referring to some other split arrangements as to which no evidence was introduced or just be mistaken in recollection. Shane was not with National General from August 1969 until approximately October 1972. (Tr. 782) (see p. 12, fn. 11, *supra.*)

that they had an agreement, an understanding, which was the substance of what he said, that no one would go day and date with the drive-in in Las Vegas.

Q. And what he indicated to you was that, just to clarify what he said, the agreement between himself and some of his competitor-exhibitors; is that correct?

MR. ALBALA: Your Honor, I object to the question, it's a leading question, the same question as before.

MR. SALOMON: All right.

Q. Would you expand on your answer? Who was the agreement with?

MR. ALBALA: Your Honor, I object to the procedure whereby he asks a leading question which he can't get in, and then asks the witness to mimic what he just tried to lead him on." (Tr. 779-781.)

* * *

"Q. Mr. Shane, what agreement did Mr. Adams refer to?

A. I don't know what agreement. All I can do is tell you what Mr. Adams said to me. I wasn't party to any agreement.

Q. He had an agreement with somebody?

A. Yes, sir." (Tr. 780-781.)

* * *

"Q. Did Mr. Adams ever say anything to you, the substance or effect of which was that an agreement existed between National General and other exhibitors in the Las Vegas area with respect to whether or not they would play day and date with anyone?

A. No, sir, I don't think he ever used the term, the words earlier to the situation that I have described, ever used the word 'agreement'. The inference was always there." (Tr. 783-784.)[15]

* * *

"Q. Mr. Shane, did anything happen that you observed that would indicate to you that in 1966 National General had an agreement with any of its competitors not to play day and date with anyone?

A. No sir.

Q. Did anything happen in the year 1967 which would indicate to you that National General had an agreement not to play day and date with anyone?

A. No, sir.

Q. How about 1968?

A. That is the time that I recollect we started to become a little more concerned about the advent of the drive-ins in Las Vegas. Prior to that time our concern was only to try to eliminate bidding and try to, per se, maintain an exclusive policy in Las Vegas. I don't think we ever recognized drive-ins as a competitor prior to 1968 or 1969.

Q. My question is, in 1968, did anything happen which indicated to you that an agreement

[15]As the District Court stated in response to respondents' objection, a witness is not permitted to draw an inference (Tr. 784), and such an inference cannot be evidence from which the trier of fact can then draw another inference.

existed not to play day and date with any drive-in?

A. No sir."[16] (Tr. 786-787.)

The substance of Shane's testimony is simply that, while he was with National General, it had a policy of exclusivity not only in Las Vegas, Nevada, but in all other areas where it owned and operated theatres; that Adams related to him a decision had been made *by* National General to maintain that exclusivity in Las Vegas; that Adams *never* said that there was an agreement with anyone not to play day and date (Tr. 784) and in fact nothing indicated to Shane that there was any such agreement. (Tr. 786-787.)

The only time Shane referred to any agreement is in regard to three 20th Century-Fox motion pictures in the fall of 1972. Petitioner did not offer any evidence or in any way seek to identify these pictures or to show petitioner sought to play these pictures; or that the pictures actually played in Las Vegas, Nevada, or that petitioner was damaged by not playing these unidentified pictures day and date. These unidentified pictures were released in late 1972 or 1973, *entirely outside of the damage period and long after the complaint in this action had been filed.*

When specifically asked by petitioner's counsel regarding this so-called "agreement", the witness stated

[16]If no facts existed during the relevant period from which one can infer an agreement, on what basis could Shane infer an agreement except by pure speculation and conjecture? See, *United Shoppers Exclusive v. Broadway-Hale Stores, Inc.*, 1966 CCH Trade Cases, ¶71,727 (N.D.Cal. 1965).

that he knew of no such agreement *or any facts supporting such an agreement* and was merely drawing what is a totally unsupported inference. (Tr. 784.)

The balance of the testimony cited by petitioner on this subject is by Syufy. Again, only a very selective *portion* of the testimony is set forth. (PB 16-17.) The significant portion of his testimony wherein he explains what he means is not cited. (Tr. 1306-1324.) Syufy admitted that when he used the word "agreement," he meant that Katz, Schmidt and Polier (an employee of National General) had *only* told him that there was a split of product among certain theatre exhibitors during a certain period of time and *he inferred* that by split they meant there was an agreement not to play day and date. (Tr. 1322, 1324.) It is undisputed that the only splits that existed during the relevant time period were a 1968 split among Cragin, NTC and National General, and a split in 1971 among petitioner, NTC, ABC, Las Vegas Cinerama and Cragin (*supra*, pp. 10-13), neither of which affected or could have affected petitioner. *Dahl, Inc. v. Roy Cooper, Inc., supra; Brown v. Western Massachusetts Theatres, Inc.*, 288 F.2d 302 (1st Cir. 1961); *Viking Theatre Corp. v. Paramount Film Distributing Corp.*, 320 F. 2d 285 (3d Cir. 1963) aff'd *per curiam* 378 U.S. 123; *United States v. Loew's Inc.*, 1962 CCH Trade Cases, ¶70,347 (S.D.N.Y. 1962). Petitioner specifically disclaimed any adverse effect on it by reason of any split. (Tr. 1142.)

Respondents submit this testimony (hearsay as to each other defendant and not admissible unless the conspiracy is proven by other credible evidence taken in its whole context) is insufficient evidence upon

which to submit to a jury the question of whether there was an agreement as claimed among all of the respondent theatre operators during the relevant period. The testimony is specifically that there were actually no statements made regarding any agreement. In addition, none of the testimony refers in any way to defendants Las Vegas Cinerama or ABC. ABC did not open a theatre and was not in the Las Vegas market until February 1970, and therefore could not have been a party to any alleged agreement since there was competitive bidding throughout 1970 and a split among all parties, including petitioner, in 1971. (See, pp. 10-13, *supra.*) The Las Vegas Cinerama Theatre was not a party to any split until 1971, which split then included petitioner. The Las Vegas Cinerama Theatre was not even competing for the same product as petitioner or other exhibitors until late 1969, and therefore could not have been a party to any such agreement. (See, p. 12, fn. 8, *supra.*)

Katz testified when asked regarding the existence of any such agreement, as opposed to a split, that there was none. (Tr. 293, 295, 675, 953.) The fact that day and date exhibition may have been discussed at split meetings in 1968 among Cragin, NTC and National General is immaterial.[17] It would be pointless for exhibitors to have a split arrangement in 1968 or 1971 to avoid cut throat competition[18] and simultaneously decide to play day and date and thereby dilute gross and profit. (Tr. 2162.)

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[17]Since the only split arrangement which did not include petitioner during the relevant period was in 1968, Katz' testimony can only relate to that year.

[18]As set forth in *Brown v. Western Massachusetts Theatres, Inc.*, p. 13, n. 12, *supra*, exhibitors are not obligated to engage in competitive bidding for motion pictures.

The Court of Appeals did not ignore the evidence. It specifically considered Shane's testimony, as well as that of Syufy. As this Court has held, mere parallel conduct in and of itself does not equate with proof of a conspiracy; the fact that the exhibitors did not play on a day and date basis (keeping in mind there was no evidence that motion pictures were generally available on this basis) does not equate with proof of a conspiracy. As this Court found in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 277 (1968), and as the Court of Appeals and District Court found below, in dealing with parallel conduct there may be various independent business reasons for respondents choosing to bid for films on an exclusive only first-run basis. In such a context, evidence of parallel action is insufficient to prove an agreement. This is a basic principle followed throughout the federal judiciary. *Brown v. Western Massachusetts Theatres, Inc., supra,* at p. 304; *Dahl, Inc. v. Roy Cooper Co., supra,* at p. 19; *Seago v. North Carolina Theatres, Inc., supra,* at p. 638.

In reaching its conclusion, the Court of Appeals also considered the fact that the Bonanza Theatre, not charged with being a member of the alleged conspiracy, also chose to exhibit motion pictures first-run exclusively rather than to play on a day and date basis, despite petitioner's request that it do so. Similarly, Mann Theatres and Plitt Theatres, also non-parties, both chose to exhibit pictures first-run exclusively rather than day and date in the very same theatres in which defendants National General and ABC respectively had exhibited motion pictures first-run exclusively. (Tr. 308, 309, 724-726, Cl. R. 219, para. 19.)

Petitioner's claim that evidence of an agreement can be inferred from the fact that no motion pictures played

first-run day and date in the Las Vegas market during the relevant period is totally without foundation. Petitioner's own walk-in theatres in areas outside of Las Vegas (Reno, San Francisco, San Jose, Oakland, etc.), including areas where it had both walk-in and drive-in theatres, played first-run exclusive, which was petitioner's policy, rather than first-run day and date. (Tr. 1639-1660, 1663-1671, 1674, 1680-1682.) Are we to infer that this was pursuant to some conspiratorial agreement between petitioner and others? Are we also to assume that the Bonanza Theatre, as well as Mann Theatres and Plitt Theatres played first-run exclusive pursuant to an agreement?

Katz' cited testimony that the participants in the 1968 split[19] were aware of Syufy's desire to play day and date and that the effectiveness of the split would continue if each of the participants continued with their independent historical policy to play exclusive means nothing more than that each member of the split knew it would have to bid against Syufy for pictures to play them first-run exclusively so as not to substantially dilute their grosses. As Katz testified, he preferred to play first-run exclusively; however, by reason of the cost of defending this litigation together with the competitiveness of the Las Vegas market and the guarantees and advances required in such bidding situation, he eventually agreed with petitioner to play day and date as part of a settlement agreement. (See n. 5, *supra.*) It is this competitive market which petitioner seeks to avoid.

Petitioner further argues that the parallel course of conduct of exclusivity was maintained by respondents against their economic interests because petitioner

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[19]Katz' testimony can only relate to that year, see p. 23, n. 17.

claims they could make more money on a day and date basis. In support of this conclusion, petitioner cites the testimony of Syufy and incorrectly cites testimony of Katz which is erroneously attributed to respondent Cragin. Katz simply testified that the losses experienced by him in the very competitive market declined when he no longer had to offer guarantees or pay high terms required for exclusive engagements. He did not testify that he was doing better playing day and date. (Tr. 302-303.) Syufy's cited testimony states no more than his drive-ins would have grossed more playing first-run all the time on a day and date basis, rather than only part of the time on an exclusive basis (Tr. 1301), and that two simultaneous runs of a motion picture gross more than one run, which latter statement is totally without significance. Syufy admitted that an exhibitor does not necessarily make more money by exhibiting day and date. (Tr. 2361-2363.)

From the distributor's business point of view, the total gross on first-run is not the end of the relevant analysis. What is important is the total revenue realized from a motion picture in an area. This is a function of box office gross from first-run and subsequent runs. Petitioner's own damage expert testified that to determine the best method of distribution it would be necessary to determine revenue from an exclusive run followed by subsequent runs (which was and is the pattern in Las Vegas) as compared to a day and date run, recognizing that the day and date run eliminates the subsequent run at a drive-in or walk-in if the drive-in plays it first-run exclusively. (Tr. 519, 1474, 1480.)

The inherent contradiction in petitioner's argument is demonstrated by analyzing the National General

theatre situation in Las Vegas. It is undisputed that, prior to petitioner entering the Las Vegas market, National General had both a drive-in and walk-in theatre. According to petitioner, National General would have made more money playing day and date between its own walk-in and drive-in than playing exclusive with a subsequent run in its own drive-in. The fact is National General did not do so before or after petitioner entered the market. Petitioner's argument in this factual context is totally unreasonable. It is unreasonable to suggest that a jury be permitted to draw inferences based on such a theory.

II

The Alleged Agreement Could Have No Impact on Petitioner as the Court of Appeals Properly Stated There Was No Evidence That Motion Pictures Were Available on a Day and Date Basis.

Petitioner claims that the Court of Appeals ignored evidence relating to the manner in which distributors offered motion pictures in Las Vegas during the relevant period. In support of this contention, petitioner cites the partial testimony of Katz. (PB 12.) In so doing, petitioner totally misreads what the Court of Appeals stated and what the evidence disclosed.

Petitioner fails to cite or in any way refer to the following statement by the Court of Appeals: ". . . On cross-examination appellant admitted that the large majority of films offered for bids during the 1967-1971 period were available on an exclusive basis only." Petitioner, in fact, does not take issue with this accurate statement of the evidence.

As set forth at pages 14-15, *supra*, petitioner offered no evidence as to what pictures or how many were

offered on an "either/or" basis or that petitioner did not play first-run exclusive any or all pictures so offered. Petitioner played exclusive first-run 40% of the time. (Cl. R. 221, para. 29.) No contention is made that any distributor offered any pictures day and date only.

Syufy admitted a distributor decides how it wants to offer a picture and that is the way the exhibitor makes its bid or offer. (Tr. 1874.) In fact, all witnesses so testified. (Tr. 255-256, 318, 722, 1874.)

When asked what motion pictures had been offered by distributors on an "either/or" basis, which petitioner apparently contends would have possibly permitted it to play on a day and date basis with a walk-in (assuming any walk-in desired to do so and assuming further the petitioner secured the picture in opposition to other drive-in theatres in the area), Syufy stated, "I would have to look at the records to answer that." (Tr. 1942, 1943.) At no time were any such records offered. Petitioner's statement that "in 1966, the distributors, prodded by Syufy's request, began to offer their films for exhibition in Las Vegas on an either/or basis . . ." (PB 6), is totally unsupported by the record. As Katz testified, "sometime prior to 1968" distributors "on occasion" offered a certain "class" of motion picture on an either/or basis. (Tr. 226-271, 465.) There was no evidence as to whether this practice on occasional pictures of a certain class continued beyond a period of time "prior to 1968." The only documentary evidence introduced regarding the manner in which pictures were offered by distributors (which documents were from petitioner's own files) showed that pictures were offered only on an exclusive basis during the relevant period. (See p. 15, *supra.*)

Furthermore, as the Court of Appeals pointed out, petitioner failed to call any distributors as witnesses (even by deposition testimony), and offered no evidence that distributors did not reach individual decisions as to the manner in which to offer motion pictures in the Las Vegas market.

Finally, although petitioner's entire claim is based on the concept that it was prevented from showing first-run motion pictures by the alleged agreement of respondents, the evidence showed that during the relevant period petitioner exhibited first-run motion pictures on a first-run exclusive basis more than 40% of the time. (Tr. 354-361, 366, 377, 644-648, Cl. R. 221, para. 29.) There was no evidence that any other exhibitor in Las Vegas, including any of the respondents, exhibited more first-run motion pictures than petitioner during the same period. (Cl. R. 221, para. 30.)[20]

III

The Court of Appeals Has Not Contravened This Court's Opinion in Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., or in Any Other Case.

Petitioner's citation of this Court's opinion in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), in support of its petition, is totally inappropriate.

In *Theatre Enterprises,* this Court affirmed a judgment for defendants entered on a jury verdict. The petitioner in that case urged that a directed verdict

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[20]In fact, there was no evidence offered or introduced as to how many weeks of exclusive first-run was played by any of respondents' theatres in Las Vegas. (Cl. R. 221, para. 30.)

should have been entered in its favor as to the issue of liability, arguing that parallel business behavior conclusively established agreement. This Court disagreed. In affirming the Fourth Circuit Court of Appeals, this Court held that sufficient other competent evidence must be presented before an "agreement" can be concluded. This Court did not hold, as asserted by petitioner, that the mere existence of parallel business behavior dictated the submission of the question of "agreement" to a jury, but rather held exactly the opposite.

The principle that a conspiracy or "agreement" cannot be inferred where there are other factors which are at least equal or more probable to show that the course of conduct engaged in was the result of business judgment is not unique to theatre cases. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 279, 280 (1968), 88 S.Ct. 1575, 1588, a summary judgment in favor of defendant was sustained even though there was circumstantial evidence from which one could arguably draw inferences of a conspiracy. The Supreme Court rejected petitioner's argument to the contrary as follows:

> "Obviously it would not have been evidence of conspiracy if Cities refused to deal with Waldron because the price at which he proposed to sell oil was in excess of that at which oil could be obtained from others. Therefore, it is only the attractiveness of petitioner's offer that makes failure to take it up suggestive of improper motives. However, it has been demonstrated above that for Cities to enter into any deal with Waldron for Iranian oil would have involved it in a variety of unpleasant consequences sufficient to deter it from making any such deal. Therefore, not only is the inference that Cities' failure to deal with the product of factors other than conspiracy *at least equal* to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable." (Emphasis added.)

Conclusion.

At most, petitioner attempts to present to this Court a disagreement based on its unsupported interpretation of the evidence. It has presented nothing which "is of importance to the public" or where there is any "conflict of opinion and authority" between Circuit Courts of Appeals or between the courts below and this Court. For these reasons alone, as well as all the reasons set forth above, respondents respectfully submit that the Petition should be denied. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 (1955); *Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1922).

Dated: October 13, 1978.

Respectfully submitted,

HARRY B. SWERDLOW,
SWERDLOW, GLIKBARG & SHIMER,
A Professional Corporation,
Attorneys for Respondents.

Of Counsel:
ALLAN ALBALA.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of October, A.D. 1978.

_____

_____

Supreme Court, U. S.
FILED
OCT 16 1978
DAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-266

SYUFY ENTERPRISES, a partnership, successor in interest to original plaintiffs, LAS VEGAS DRIVE-IN THEATRE, INC., SMOKE RANCH DRIVE-IN THEATRE, INC., LAS VEGAS THEATRE CORPORATION, and CONFECTION CORPORATION OF LAS VEGAS, INC.,

Petitioner,

vs.

NATIONAL GENERAL THEATRES, INC., ABC INTERMOUNTAIN THEATRE CO., NEVADA THEATRE CORPORATION, SOUTHWEST AMUSEMENT CORPORATION, LUCILLE MARLEAU CRAGIN, d/b/a EL PORTAL THEATRE, and LAS VEGAS CINERAMA THEATRE CO.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (By Respondent Lucille Marleau Cragin, d/b/a El Portal Theatre)

SMITH, O'BRIEN & AVILA
FRANKLIN N. SMITH
JOHN D. O'BRIEN
710 Bank of Nevada Building
225 East Bridger Avenue
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Attorneys for Respondent, Lucille Marleau Cragin, d/b/a El Portal Theatre

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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In the Supreme Court of the United States

OCTOBER TERM, 1978

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SYUFY ENTERPRISES, a partnership, successor in interest to original plaintiffs, LAS VEGAS DRIVE-IN THEATRE, INC., SMOKE RANCH DRIVE-IN THEATRE, INC., LAS VEGAS THEATRE CORPORATION, and CONFECTION CORPORATION OF LAS VEGAS, INC.,

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NATIONAL GENERAL THEATRES, INC., ABC INTERMOUNTAIN THEATRE CO., NEVADA THEATRE CORPORATION, SOUTHWEST AMUSEMENT CORPORATION, LUCILLE MARLEAU CRAGIN, d/b/a EL PORTAL THEATRE, and LAS VEGAS CINERAMA THEATRE CO.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (By Respondent Lucille Marleau Cragin, d/b/a El Portal Theatre)

Respondent, Lucille Marleau Cragin, d/b/a El Portal Theatre, hereinafter called "Cragin", respectfully submits to the Court her Brief in Opposition to Petition for Writ of Certiorari, as follows:[1]

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[1]All defendants were represented in the lower courts by attorney Harry B. Swerdlow. By substitution of attorneys filed therein, defendant Cragin is now represented by Franklin N. Smith and John D. O'Brien, her Nevada Counsel in the District Court proceedings.

ISSUE

Whether both courts below correctly determined that the refusal of the defendant motion picture exhibitors to exhibit films on a first-run day and date basis[2] with plaintiff resulted from an agreement or conspiracy between said defendants to violate Section 1 of the Sherman Act (15 U.S.C. § 1).

STATEMENT OF THE CASE OMITTED

Pursuant to Supreme Court Rule 40 (3) defendant Cragin elects not to submit a statement of the case since all relevant facts are adequately set forth in the Opinion of the Circuit Judge (Appendix hereto). Petitioner's version of the testimony adduced in his behalf will be briefly commented upon in the ensuing Argument.

ARGUMENT

In essence, Syufy contends that the District and Circuit Judges failed to consider certain testimony, and that, under principles established by prior decisions, the issue of the defendants' conspiratorial conduct should have been submitted to the jury.

A. A portion of plaintiff's recitation of the facts is devoted to "split agreements" between various defendants. But it is to be noted that these were not challenged by Syufy in the Circuit Court (Appendix, page 9), and in any event, the existence of a split system of distributing

[2]A first-run day and date motion picture is one simultaneously exhibited for the first time in a certain locality by two theatres.

motion pictures to exhibitors, of itself, does not constitute evidence of a conspiracy to violate anti-trust laws. *Dahl, Inc.* v. *Roy Cooper Co.*, 448 F2d 17 (9th Cir. 1971); *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F2d 285 (3rd Cir. 1963), aff'd Curiam, 378 U.S. 123; *Brown* v. *Western Massachusetts Theatres, Inc.*, 288 F2d 302 (1st Cir. 1961).

The evidence does not reflect that any of the exhibitors were required to bid upon films, or that these split agreements were motivated by anything other than individual business practices, or that plaintiff was precluded from joining therein. In fact, Syufy did participate in one such agreement and voluntarily withdrew therefrom (Appendix, page 9).

B. From the hundreds of pages of transcribed testimony, plaintiff proffers only a few isolated statements which are alleged to raise factual issues for the jury, namely statements made by witnesses Lloyd Katz, general manager of Nevada Theatre Corporation (a defendant dismissed from the action prior to trial), Emmett Shane, an employee of defendant National General Theatres, Inc. and by Syufy himself.

Lloyd Katz is alleged to have testified to the fact that motion picture exhibitors offered exhibitors the choice of bidding films on either an exclusive or day and date basis (T. 266-271). Actually, Katz makes reference to a "class" of films which were "compatible to this type of distribution", whatever that may mean. Certainly it does not establish that such films were of the kind defendants were exhibiting, and the dates to which he refers are between 1966 and 1968, which might well have been prior to the applicable four year period commencing on November 24, 1967.

The testimony of witness Emmett Shane (T. 771-780), and statements attributed to Horst Schmidt (T. 955-958) and Lloyd Katz (T. 945-953), were offered as proof of the existence of an agreement or conspiracy not to bid pictures against Syufy. Aside from the fact that this "proof" generally consisted of vague references to an "understanding", "policy" or "arrangement" between some of the defendants, no evidence was introduced to establish that any agreement which might be inferred therefrom was entered into for the purpose or with the intent to injure plaintiff or his business in any manner. The testimony of Syufy himself was of no more significance in this respect than that of his witnesses, and it is to be noted that no mention was made of the distributors of these motion pictures, although they were the ones with absolute control over the films to be offered to the exhibitors, and what bids to be accepted therefor (Appendix, pages 12-13).

Such testimony might indicate a separate course of conduct pursued by the defendants, but the District Court and the Circuit Court of Appeals found that individual business reasons motivated the refusal of each defendant to bid day and date pictures against Syufy, or any drive-in theatre, since they would make more money by so doing; that this course of conduct was not aimed at Syufy, nor intended to injure him; and that, though parallel in the actions of each other, the decisions to bid in this manner were reached separately and independently and not by mutual agreement or pursuant to any conspiracy. The evidence fully supports these findings.

The rule, in such cases, is well stated in *Dahl, Inc.* v. *Roy Cooper Co.*, supra, 448 F2d 17, at page 19, as follows:

> "Thus, conspiracy is the gravamen of this complaint. Dahl need not show explicit contractual agreements in order to prove a conspiracy, but it must demonstrate more than that the alleged co-conspirators engaged in a course of conduct, even if conscious of each other's parallel behavior, in which they would have engaged regardless of the others' conduct."

It is clear from the evidence, and Syufy must concede that he could have adopted the defendants' practice of bidding upon a first-run exclusive basis, and that he was not precluded from so doing. He chose instead, for his own business reasons, to play day and date. By means of this present action, he seeks to compel the defendants to adopt his method of operation in the place of theirs. As stated in *Dahl, Inc.* v. *Roy Cooper Co.*, supra, 448 F2d at page 19, "we cannot escape the conclusion that Dahl [Syufy] really is complaining that it was not apportioned film by the distributors free from the necessity of competing for it."

C. As a final point, plaintiff contends that the opinion of the Court of Appeals in this case directly contravenes the decision of *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), in that, although the Circuit Court acknowledged evidence of defendants' parallel business conduct by admitting that "it is true that the film exhibitors all refused to bid for films on a day/date basis", it declined to submit the question of defendants' conspiracy to a jury. It is asserted that, under the *Theatre Enterprises* case, this evidence alone creates an issue of fact concerning the existence of a possible conspiracy.

This decision does not so hold. In fact, it is cited with approval in *Dahl, Inc.* v. *Roy Cooper Co.*, supra, 448 F2d 17, as authority for the principle quoted hereinabove to the effect that a parallel course of conduct by defendants, even if each is conscious of the other's like behavior, is not of itself a violation of the anti-trust laws. Lacking additional evidence of an agreement or conspiracy, there was no factual issue to submit to the jury.

CONCLUSION

For the reasons set forth above, respondent Cragin submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

SMITH, O'BRIEN & AVILA
FRANKLIN N. SMITH
JOHN D. O'BRIEN
Attorneys for Respondent, Lucille Marleau Cragin, d/b/a El Portal Theatre

Dated, Las Vegas, Nevada, October 13, 1978.

APPENDIX

UNITED STATES COURT OF APPEALS
Ninth Circuit

No. 76-2003

Syufy Enterprises, a Partnership, Successor in Interest to Original Plaintiffs, Las Vegas Drive-In Theatre, Inc., Smoke Ranch Drive-In Theatre, Inc., Las Vegas Theatre Corporation, and Confection Corporation of Las Vegas, Inc.,

Appellant,

vs.

National General Theatres, Inc., ABC Intermountain Theatre Co., Nevada Theatre Corporation, Southwest Amusement Corporation, Lucille Marleau Cragin, d/b/a El Portal Theatre, and Las Vegas Cinerama Theatre Co.,

Appellees.

[Filed Apr. 7, 1973]

Appeal From the United States District Court
District of Nevada

OPINION

Before: KILKENNY and GOODMAN, Circuit Judges, and MURRAY, District Judge.*

KILKENNY, Circuit Judge:

Appellant appeals from a directed verdict granted on its antitrust claim against appellees. The district court concluded that the evidence of violation of § 1 of the Sherman Act, 15 U.S.C. § 1, was insufficient. We affirm.

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*The Honorable William D. Murray, Senior United States District Judge for the District of Montana, sitting by designation.

FACTS

This action was filed in federal district court in 1971 alleging violations of §§ 1 and 2[1] of the Sherman Act. In essence, the complaint charged certain Las Vegas theatre owners of conspiring with non-named film distributors to confine the exhibition of first run films to appellees' theatres. In addition, appellees were charged with secretly agreeing to divide first run films among themselves to the exclusion of the appellant. Appellees answered and also counterclaimed alleging that the appellant had engaged in abuse of the litigation process. The trial before a jury commenced in 1975, and at the conclusion of the appellant's case the court granted appellees' motion for a directed verdict. Appellant filed a notice of appeal which was dismissed without prejudice in light of the pending counterclaim. The counterclaim went to trial in 1976, and appellant's motion for mistrial was granted. The counterclaim was then severed from the original complaint allowing for this appeal.

THE LAS VEGAS THEATRE MARKET

Appellant entered the theatre business in Las Vegas in 1966 when it opened the Las Vegas Drive In. Four of the named appellees were operating theatres at that time, the Nevada Theatre Corporation [NTC], National General Theatres [National General], Las Vegas Cinerama [Cinerama], and Cragin. (Hereinafter collectively referred to as exhibitors.) All of these appellees were operating conventional indoor theatres when the appellant opened its drive-in theatre. There were two other drive-ins in Las Vegas in 1966, one operated by National General and the other by a non-party. Another named appellee, ABC

[1]The § 2 claim was not pursued.

Intermountain Theatre Co. [ABC], opened its first Las Vegas theatre in 1970.[2] The record does show that during the 1966-1971 period there was at least one other theatre, The Bonanza, operating in the Las Vegas market.

During the five years preceding this action Las Vegas theatre owners drifted in and out of so called "split agreements." As defined by the district court a split is an arrangement among participating exhibitors in a market area entered into with the knowledge and consent of distributors. The participants therein agree that a member thereof shall have the first right to negotiate with a licensing distributor. A split can be by company or by picture. In a company split, the participating exhibitors agree that a member thereof shall have the right to negotiate for the pictures released by a given company prior to any other members doing so. In a picture split, the participants agree that a member thereof shall have the right to negotiate for a particular picture prior to the other members so doing. From 1951 to 1965 there were only two exhibitors in Las Vegas, and they were parties to a split agreement. During 1966 and 1967 there was no split agreement, and all theatre owners competed freely for films. In 1968 another split agreement was born among National General, Cragin, and NTC. The split dissolved, and for all of 1969 and 1970 the Las Vegas exhibitors again bid without restraint for their films. In 1971 all of the named appellees, as well as the appellant, formed yet another split agreement. Appellant withdrew later that year and filed this claim. At no time was the Bonanza Theatre a party to any split agreement. Appellant does not challenge nor would such a challenge be

[2]Appellant introduced no proof as to Southwest Amusement Corporation.

sustained to the various split agreements. *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 20 (CA9 1971).

In addition to the split agreements, the process of procuring a motion picture for showing in a particular theatre is complicated by the terms of the distributor's contract with the individual exhibitor. Generally, distributors ask for bids on all their films. They can seek bids on at least three sets of terms. First, the distributor can extend bid invitations to an exhibitor on an "exclusive" basis. As the district court found, a picture exhibited on an exclusive basis is shown at only one theatre in any one particular market area. Second, the distributor can offer to bid the film on a "day/date" basis. This would mean that the film would be shown at more than one theatre, either drive-in or conventional, in a given market area at any one time. Third, the distributor could offer the film to bidders under either plan and then decide which one to accept. This is commonly referred to as "either/or" bidding. The decision on how to offer films for bids and what bids to accept rests solely with the distributor.

The business reasons for the differing types of exhibition contracts are obvious. The day and date allows the theatre owner to submit lower bids for films since they will not have the exclusive showing rights. This is balanced by the fact that the theatres using day and date will be competing for the same customers. The exclusive showing rights afford just the opposite considerations. Exhibitors pay higher film rental rates, but are guaranteed exclusivity. In addition, the distributors will have a greater opportunity to profit from second showings in other theatres if the first run was on an exclusive basis.

The appellant contends that the named appellees agreed not to bid for films on a day/date basis. Consequently, appellant charges that it was forced to bid for all

films on an exclusive basis. Appellant claims that it was new to the Las Vegas theatre market, and consequently was unable to offer the sort of past attendance figures to allow it to bid successfully for most exclusive pictures. The district court found that there was no evidence to show that the appellees had conspired to refuse to bid day/date to the detriment of the appellant. We agree.

STANDARD OF REVIEW

Since this matter is before the court from the entry of a directed verdict, our standard of review is quite strict. Our recent opinion in *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (CA9 1976), *cert. denied* 429 U.S. 940, accurately describes our task:

> "Our inquiry, therefore, is not whether there is substantial evidence supporting a finding of independent business purpose, but whether no reasonable jury could have found that Distributor participated in a conspiracy to restrain trade. The burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact, and, in determining whether the burden has been met, we must draw all inferences of fact against the movant and in favor of the party opposing the motion." at 683.

Although this language speaks with respect to a motion for summary judgment, the *Calnetics* court properly expanded it to review of directed verdicts. *See also, Santa Clara Valley Distributing Co. v. Pabst Brewing Co.*, 556 F.2d 942, 944 (CA9 1977).

EXHIBITORS' INVOLVEMENT

Appellant offered two witnesses to prove there was an agreement among Las Vegas theatre owners not to bid

day/date for films to be shown in their market. The first witness was one Shane, former head booking agent at National General. His testimony is somewhat ambiguous, but a fair reading does not show the existence of any agreement among the appellees to refuse to bid day/date with appellant. The other witness offered to prove the conspiracy was the appellant himself. He suggested that several employees of the appellees had told him that they could not bid on a day/date basis for films because of an agreement between the various appellees. The distributors were not mentioned. Again the record is devoid of any substantial proof of an actionable conspiracy. Rather, the testimony of officials of the various exhibitors demonstrates that each theatre had a formal individual policy of bidding for films on an exclusive basis only.

While it is true that the film exhibitors all refused to bid for films on a day/date basis, this mere parallel conduct, in and of itself, does not equate with proof of a conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Dahl, Inc. v. Roy Cooper Co., supra; C-O Two Fire Equipment Co. v. United States,* 197 F.2d 489 (CA9 1952), *cert. denied* 344 U.S. 892. The testimony indicated that there were various independent business reasons for choosing to bid for films on an exclusive only basis. Proof of mere parallel action on this record is insufficient. Furthermore, the testimony shows that the Bonanza theatre, not charged to have been a member of the alleged illegal conspiracy, at all relevant times chose not to bid for films on a day/date basis despite appellant's requests that it do so. We can only assume that the independent business motivation for offering films on an exclusive basis was behind Bonanza's decision.

DISTRIBUTORS' INVOLVEMENT

It is the distributors' absolute control over film exhibition that fully exposes the fatal flaw in appellant's arguments. As we have noted, the motion picture distributors decide how to offer films to the exhibitors and just what bids to accept, yet they are not defendants nor charged with the conspiracy. Since the exhibitor can only bid for films consistent with the distributors' bid invitation, the appellant must show that films were offered for bids on a day/date basis in the Las Vegas area before it could prove that the appellees had conspired not to bid for the films on a day/date basis. Here appellant offered no evidence that films were available on a day/date basis. In fact, on cross-examination appellant admitted that the large majority of films offered for bids during the 1967-1971 period where available on an exclusive basis only. Manifestly, the appellees could not conspire to refuse to bid on something that was not available to them. *A.L.B. Theatre Corp. v. Loew's Inc.*, 355 F.2d 495 (CA 7 1966).

Moreover, appellant has failed to show that there was anything but an individual decision on the part of each distributor to offer films on an exclusive basis only. While the record does indicate that a distributor's decision on the method of offering its films to exhibitors may be influenced by the exhibitors themselves, there is no evidence to suggest that the appellees in any way dictated distributor policy. A mere refusal by an individual distributor to offer films on a day/date basis without an agreement does not violate the antitrust laws. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1220 (CA9 1977), and *Dahl, Inc. v. Roy Cooper Co., supra.*

DAMAGES

In the light of the above conclusions, we do not reach the issue of damages.

CONCLUSION

The judgment of the district court must be affirmed.

IT IS SO ORDERED.